United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

ORIGINAL

76-6109

IN THE

United States Court of Appeals

For the Second Circuit

B P/S

HUNTINGTON TOWERS, LTD. and RICHARD CAREY,
Plaintiffs-Appellants,

against

FRANKLIN NATIONAL BANK (in liquidation) and
FEDERAL DEPOSIT INSURANCE CORPORATION,
Defendants,

FEDERAL RESERVE BANK OF NEW YORK,
EUROPEAN-AMERICAN BANK, and JAMES SMITH,
individually and as Comptroller of the Currency,
Defendants-Appellees.

On Appeal from an Order of the United States District Court for the Eastern District of New York

UNITED STATES COURT OF APPEALS
FILED
OCT 29 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOINT APPENDIX

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75 C 972 HUNTINGTON TOWERS, LTD. v. FRANKLIN NATIONAL BANK. et al.

DATE	NR.	PROCEEDINGS
06-18-75		Cause on transfer received from Southern District of New York and filed. Acknowledgement for receipt of record mailed to Clerk. (1)
6-23-75		By JUDD, J.-Stipulation dtd 6-20-75 [illegible] FDIC, Federal Reserve Bank of NY and European American Bank to answer to 7-[illegible]-75 filed. (2)
7-24-75		Request for production of documents filed. (3)
7-24-75		Request for production of documents filed. (4)
7/29/75		Notice of Motion, ret. Sept. 19, 1975 re: to dismiss complaint filed (5)
7/29/75		Memorandum on behalf of the Federal Reserve Bank of New York in Support of its Motion to Dismiss for failure to state a claim and for want of subject matter jurisdiction filed. (6)
7-30-75		By JUDD, J.-Stip. & Order dtd 7-28-75 that the time for the defts Franklin Nat'l Bank, FDIC, European American Bank, and James Smith to answer is extended to 9-15-75 filed. (7)
7-30-75		Affidavits of Anna Mallis filed. (8/9)
8-[illegible]-75		Notice of motion ret 8-29-75 for an order staying discovery filed. (10)
9-[illegible]-75		Response to pltffs' request for the production of documents by deft Franklin National Bank filed. (11)
[illegible]-75		Before JUDD, J.-Case called and adj'd to 9-16-75 re deft's motion for an order staying discovery or extending time --
		By JUDD, J.-Stip. on Order dtd 8-29-75 that the motion of deft European-American Bank & Trust Co staying discovery of extending time to answer or object to pltffs request for production is adj'd to 9-19-75 filed. (12)
9/19/75		Notice of Motion, ret. 9/19/75 filed re: to dismiss the complaint, etc. (13)
9/[illegible]/75		Memorandum of Law in Support of above motion filed. (14)
9-[illegible]-75		Notice of motion ret. 9-26-75 for an order to dismiss the complaint as to FDIC & memo of law in support of motion filed. (15/16)
9-17-75		Notice of motion ret 9-26-75 for an order to dismiss complaint as to Franklin National Bank & memo of law in support of motion filed. (17/18)
9-18-75		By JUDD, J. - Order dtd 9-18-75 adjourning motion to dismiss, etc. to 10-31-75to 10 A.M. filed. (19)
9-22-75		By JUDD,J.- Order dated 9/19/75 filed that the time of the deft James Smith to answer the complaint is extended to 9/26/75 (20)
9-23-75		By JUDD, J. - Order dtd 9-23-75 adjourning motion for dismissal to9-30-75 at 10 A.M. filed. (21)
9/26/75		Notice of Motion, ret. 10/30/75 filed re: to dismiss,etc. (22)
9/26/75		Memorandum in Support of the deft Comptroller's Motion to Dismiss or in the alternative for summary judgment filed. (23)
10-29-75		By JUDD, J. - Order dtd 10-28-75 adjourning motions from 10-30-75 to 1-16-76 at 10 A.M. filed (24)
1-30-76		Before JUDD,J.-Case called and defts motion dismissing the complaint adj'd to 2-20-76.
2-[illegible]-76		Copy of letter dtd 2-2-76 to Hughes Hubbard & Reed and Cahill, Gordon & Reindel etc from Sheldon D. Camhy filed. (25)
2-2-76		Affidavit of Sheldon D. Camhy filed. (26)
2-3-76		Pltffs' memorandum in opposition filed. (27)
		Pltffs' counterstatement pursuant to Rule 9(g). (re European-Amer) (28)
		Pltffs' counterstatement pursuant to Rule 9(g). (re deft Smith) (29)
2-3-76		Affidavit & suppl. affidavit of Richard Carey filed. (30)

SC 972
VIL DOCKET CONTINUATION SHEET

JA 2

PLAINTIFF	DEFENDANT	DOCKET NO.
HUNTINGTON TOWERS, LTD etc	FRANKLIN NATIONAL BANK	PAGE ___ OF ___ PAGES

DATE	NR.	PROCEEDINGS	
2-3-76		Affidavit of Seymour Ikenson filed.	(31)
2-17-76		Reply memo of law on behalf of Federal Reserve Bank in support of its motion to dismiss complaint filed.	(32)
2-18-76		Reply memorandum of Franklin National Bank filed.	(33)
2-18-76		Reply memorandum of FDIC in support of motion to dismiss filed.	(34)
~~2-18-76~~		~~European-American's reply memorandum filed.~~	~~(35)~~
~~2-18-76~~		~~Supplemental memorandum of Marine Midland Bank-New York in support of its motion for summary judgment filed.~~	~~(36)~~
2-18-76		European-American's reply memorandum filed.	(35)
2-23-76		Before JUDD,J.- Case called. Defts. motion dismissing the complaint Motion argued. Decision reserved.	
3-1-76		Supplemental memo of FDIC filed.	(36)
3-3-76		Ntoice of examination of plaintiffs filed.	(37)
3-18-76		zx By JUDD,J.- Order adjd of depositions to 4-27-76 filed.	(38)
4-14-76	ju	Supplemental affidavit in opposition to the motion for summary xx judgment of deft European-American BAnk & Trust Co. filed.	(39)
4-19-76		Letter dtd 4-16-76 to J. Judd from Philip K. Howard filed.	(40)
4-26-76		By JUDDJ- Stip & Order dtd 4-23-76 that the deposition of pltff is adj'd to 5-29-76 filed.	(41)
5-21-76		By JUDD,J-Stip. & Order dtd 5-19-76 adjourning the oral examination to 6-9-76 filed.	(42)
6-10-76		By JUDD,j-Stip. dtd 6-10-76 adjourning deposition of pltff to 7-14-76 filed.	(43)
7-1-76		By JUDD,J-Memorandum and Order dtd 7-1-76 directing the Clerk to enter judgment dismissing the complaint as against deft Federal Reserve Bank of New York; European-American Bank, and James E. Smith, with costs. Copies mailed from Chambers.	(44)
7-6-76	JS.	Judgment dtd. 7-2-76 that the complaint as against defts Federal Reserve Bank of New York, European Bank and James E. Smith is dismissed with costs filed.	(45)
7-6-76		Pltff's supp memo of law filed.	(46)
7-12-76		Notice of appeal filed. Copy mailed to C of A and adv. (pltff)	(47)
7-14-76		By DOOLING,J-Stip. & Order dtd 7-13-76 that the time of the deft FDIC to plead is extended to 8-2-76 filed.	(48)
7-15-76		By DOOLING,J.- Order dtd. 7-13-76 adjd of deposition of pltffs from 7-16-76 to 9-28-76 filed.	(49)
7-15-76		Two volumes of [illegible] placed xxxxxxxxxxxxx in file , to xxx be returned when finished	---
8-10-76		Above record certified and mailed to the Court of Appeals.	----cg
8-16-76		Recipt for reocrd on appela recieved from the C of A filed.	(50)
8-27-76		By PLATT,J.- Order dtd. 8-24-76 extending time for Franklin National Bank and FDIC to answer complaint ot 9-2-76 filed.	(51)
9-7-76		by PLATT,J-Stip. & Order dtd 9-7-76 that thetime of defts to answer the complaint is extended to 9-21-76 filed.	(52)
9-21-76		ANSWER of Franklin National Bank filed.	(53)

DC-111A (Rev. 1/76)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HUNTINGTON TOWERS, LTD. and RICHARD CAREY, Plaintiffs, -against- FRANKLIN NATIONAL BANK (in liquidation), FEDERAL DEPOSIT INSURANCE CORPORATION, FEDERAL RESERVE BANK OF NEW YORK, EUROPEAN AMERICAN BANK and JAMES SMITH, individually and as Comptroller of the Currency, Defendants.	COMPLAINT JURY TRIAL DEMANDED

Plaintiffs, complaining of the defendants, by their attorneys, Shea Gould Climenko Kramer & Casey, alleges upon information and belief, except as to paragraphs "1", "8", "9", "10", "11" and "12".

FOR A FIRST CLAIM

1. (a) At all times hereinafter mentioned, plaintiff Huntington Towers, Ltd. (hereinafter referred to as "Huntington") was (and is) a New York corporation.

(b) Plaintiff Richard Carey was (and is) the sole stockholder of Huntington.

2. (a) Defendant Franklin National Bank (hereinafter referred to as "Franklin National") was a national banking association engaged in business as a general commercial bank in the State of New York.

(b) Defendant Federal Deposit Insurance Corporation (hereinafter referred to as "FDIC") was (and is) a corporation organized under the laws of the United States. It acts as insurer of certain bank deposits and as liquidator and receiver for in-

solvent banks. On October 8, 1974, it was appointed receiver for Franklin National.

(c) Defendant Federal Reserve Bank of New York (hereinafter referred to as "Federal Reserve") is a corporation organized pursuant to the laws of the United States.

(d) Defendant James Smith (hereinafter referred to as "Smith") is and was at all times hereinafter mentioned Comptroller of the Currency.

(e) Defendant European American Bank (hereinafter referred to as "European American") is a New York corporation organized to conduct business as a bank.

3. Jurisdiction hereunder is claimed under 28 U.S.C. §1331 and 12 U.S.C. §264(j). The matter in controversy exceeds the sum or value of $10,000.

4. On or about May 1,1974 and continuing thereafter until October 8, 1974, Franklin National was insolvent.

5. Beginning on and after May 15, 1974, defendants Smith, Federal Reserve and FDIC knew that Franklin National was insolvent and that it should have been declared insolvent and placed into liquidation proceedings pursuant to law.

6. Defendants Franklin National, Smith, Federal Reserve and FDIC entered into an illegal and improper plan to conceal the insolvency of Franklin National and to continue the said Bank in operation for a period of several months knowing that ultimately it would be declared insolvent and placed in liquidation. As part of said plan, defendant Federal Reserve made very substantial advances of funds for the purpose of maintaining the liquidity of Franklin National and for the purpose of permitting uninsured depositors to withdraw their funds from Franklin

9. In November 1973, plaintiffs and Franklin National entered into an agreement pursuant to which Franklin National agreed to finance the construction of additional improvements (a second building) on the real property hereinabove referred to. Pursuant to said agreement, Franklin National had agreed to advance (and did from time to time advance) such funds as were necessary to complete construction, up to a total amount of approximately $5,000,000 against a commitment from a responsible lending institution to issue a permanent mortgage on the completed building in the said amount.

10. Thereafter and between November 1973 and October 8, 1974 pursuant to the agreement as aforesaid, Franklin National advanced funds for the purposes hereinabove set forth in paragraph "9" and plaintiffs (i) proceeded with the construction of said building, (ii) secured the necessary commitment for a permanent mortgage and (iii) secured a major tenant for the said building. At no time did Franklin National disclose to the plaintiffs that it was insolvent and would be incapable of completing the financing as aforesaid.

11. On or about June 14, 1974, at the request of Franklin National made pursuant to the foregoing agreement, plaintiffs gave Franklin National certain additional security for monies advanced and to be advanced under the construction financing agreement hereinabove referred to. Said additional security had a value in excess of $3,000,000 and consisted of certain mortgages on unimproved and improved real property including the real property hereinabove referred to.

12. (a) In giving the said security to Franklin National plaintiffs relied on Franklin National's appearance of

solvency and its representations that it could and would complete the financing of the construction then in progress on the real property hereinabove referred to. Plaintiffs never would have given such security if they had known that Franklin National was then insolvent and that it could not and would not complete the financing hereinabove referred to.

(b) By reason of having given Franklin National said security plaintiffs materially impaired their ability to secure financing from other sources.

13. Thereafter, plaintiffs continued with the construction of the building. However, in or about September 1974, owing to its financial condition, Franklin National became unable to advance further funds for construction. In order to prevent interruption of construction with the consequent substantial financial losses involved, plaintiffs were required to draw upon other sources of funds as a temporary expediency while at the same time being reassured by Franklin National that the financing would be forthcoming from Franklin National.

14. On October 8, 1974, Franklin National was declared insolvent. However, subsequent to said insolvency, representatives of Franklin National, FDIC and European American assured plaintiffs that financing of construction by Franklin National or by European American or FDIC would continue.

15. Notwithstanding such assurances, defendants FDIC and European American have failed and refused to provide further financing for construction and construction has come to a complete halt resulting in very substantial financial losses to plaintiffs.

16. By reason of the matters hereinabove set forth, plaintiffs have been caused to be in default under secured obligations to other creditors owing to lack of funds to make payments thereunder and plaintiffs face loss by foreclosure of properties in which plaintiffs would have had substantial equity investments were it not for the matters herein set forth. Plaintiffs are substantially indebted to contractors and materialmen in respect of the uncompleted construction and to other creditors and in all plaintiffs have sustained very substantial losses.

17. By reason of the wrongful acts of defendants as aforesaid, plaintiffs have sustained damages in the approximate amount of $8,000,000.

FOR A SECOND CLAIM

18. Plaintiffs repeat and reallege each and every allegation hereinabove set forth in paragraphs "1" through "16" inclusive.

19. On or about October 8, 1974 and pursuant to plans and arrangements made several months prior thereto, defendants FDIC, European American and Federal Reserve entered into an agreement disposing of the assets of Franklin National.

20. The said agreement, in effect, transferred large portions of the assets of Franklin National to European American. The remaining assets are to be kept by FDIC to be held for the claims of creditors other than depositors. The principal of such creditors is defendant Federal Reserve which, pursuant to certain alleged agreements and claims of priority under statute, will claim priority or a lien on said assets retained by FDIC.

As a result of the foregoing arrangements, there will be little or no assets available to satisfy the claims of general creditors such as plaintiffs.

21. The arrangements among the defendants hereinabove referred to are contrary to law and constitute a fraud on the general creditors of Franklin National, and in particular, a fraud on innocent persons dealing with Franklin National after it became insolvent and while its insolvency was being concealed by the defendants.

WHEREFORE, plaintiffs demand judgment:

(1) Against the defendants for the damages sustained by plaintiffs as a result of defendants' wrongful acts in the amount of $8,000,000.

(2) Declaring that defendant Federal Reserve is entitled to no security interest or preference as against plaintiffs in respect of the assets of Franklin National held by FDIC and enjoining FDIC from granting or recognizing any such preference or security interest.

(3) Declaring null and void all mortgages or other security instruments, notes and guarantees given by plaintiffs to Franklin National;

together with interest as allowed by the Court and the costs and disbursements of this action.

Plaintiffs hereby demand trial by jury as to issues triable by jury under the Constitution, statutes or other laws of the United States.

SHEA GOULD CLIMENKO KRAMER & CASEY

By _____

A Member of the Firm
Attorneys for Plaintiffs
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

HUNTINGTON TOWERS, LTD. and RICHARD CAREY, Plaintiffs, -against- FRANKLIN NATIONAL BANK (in liquidation), FEDERAL DEPOSIT INSURANCE CORPORATION, FEDERAL RESERVE BANK OF NEW YORK, EUROPEAN AMERICAN BANK and JAMES SMITH, individually and as Comptroller of the Currency, Defendants.	75 Civ. 972 NOTICE OF MOTION TO DISMISS COMPLAINT

S I R S :

PLEASE TAKE NOTICE that defendant Federal Reserve Bank of New York will move the Court, Hon. Orrin G. Judd, U.S.D.J., in Room 11, United States Court House, Cadman Plaza, Brooklyn, New York on September 19, 1975, at 10:00 A.M. or as soon thereafter as counsel can be heard pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure for an order and judgment dismissing the complaint as to said defendant on the following grounds:

(1) The complaint fails to state a claim against defendant Federal Reserve Bank of New York upon which relief can be granted; and

(2) The Court lacks jurisdiction over the subject matter for the reason that a justiciable case or controversy is

and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
July 29, 1975

CAHILL GORDON & REINDEL

By _____
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EXHIBIT A
FEDERAL RESERVE BRIEF

For Immediate Release

May 12, 1974

In response to inquiries about Franklin National Bank, George W. Mitchell, Vice Chairman of the Board of Governors of the Federal Reserve System, today made the following comment:

Inquiries have been raised in recent days about the position of Franklin National Bank. The bank has reported a poor earnings record recently, and the management of the controlling holding company announced Friday that it would recommend that the regular dividend payment on both common and preferred stock be passed.

The Board is familiar with this situation and looked carefully at the bank's condition in connection with the proposed acquisition of Talcott National Corporation by the bank's holding company. Its decision earlier this month was to turn down this proposal in part because it felt that management's energy should be devoted to the remedial program for the bank, which is now underway.

There is, of course, the possibility that--with many rumors about the bank--Franklin National may experience some unusual liquidity pressures in the period ahead. As with all member banks, the Federal Reserve System stands prepared to advance funds to this bank as needed, within the limits of the collateral that can be supplied. Working with Franklin National, the

Federal Reserve Bank of New York has determined that there is a large amount of acceptable collateral available to support advances to the bank from the Federal Reserve discount window, if they are needed.

As a matter of general policy the Federal Reserve makes credit extensions to member banks, upon acceptable collateral, so long as the borrowing member bank is solvent. We are assured by the Comptroller of the Currency that Franklin National Bank is a solvent institution.

Chairman Burns, who is in Europe, has been kept informed of developments. Since this matter does not require his personal attention, he has no intention of changing his travel plans which call for his return to Washington later this week.

-0-

Office of the
Comptroller of the Currency

WASHINGTON, D.C. 20220

EXHIBIT B
FEDERAL RESERVE BRIEF

JA 14

May 10, 1974

Board of Governors of the
Federal Reserve System
Washington, D. C. 20551

Attention: Governor Jeffrey M. Bucher

Gentlemen:

In reply to your request for a statement concerning the condition of the Franklin National Bank of New York City, at the last full examination of the subject bank which terminated on March 8, 1974, the bank was found to have fairly severe credit and liquidity problems, but was adjudged to be solvent. Although the liquidity problem has subsequently become aggravated by adverse rumors circulating in the market place, to date, we have not received any information which would materially alter our March 8, 1974 conclusion that the bank is solvent. If there is any significant change in the condition of the bank, this office will promptly advise you.

Sincerely,

J. T. Watson

J. T. Watson
Acting Comptroller of the Currency

BEST COPY AVAILABLE

EXHIBIT C
FEDERAL RESERVE BRIEF

JA 15

No. 12997

TREASURY DEPARTMENT

OFFICE OF THE COMPTROLLER OF THE CURRENCY

NEW YORK, NEW YORK

OCTOBER 8 , 1974

3:00 P. M.

WHEREAS, from information available to this Office, I have become satisfied that Franklin National Bank, located in the City of Brooklyn, County of Kings, and State of New York, is insolvent and unable to meet the demands of its depositors and unable to pay its just and legal debts; and

WHEREAS, after due examination of the affairs of Franklin National Bank, I have determined that the Federal Deposit Insurance Corporation should be appointed receiver of the Bank:

NOW THEREFORE, I, James E. Smith, Comptroller of the Currency in pursuance of the power, duty, and authority vested in me by law do hereby appoint the Federal Deposit Insurance Corporation, Receiver of Franklin National Bank, with all the powers, duties and responsibilities given to or imposed upon a Receiver under the provisions of the laws of the United States which authorize and direct the appointment of such Receiver.

James E. Smith

Comptroller of the Currency

BOARD OF GOVERNORS

of the

FEDERAL RESERVE SYSTEM

EXTENSIONS OF CREDIT BY FEDERAL RESERVE BANKS

REGULATION A

(12 CFR 201)

As amended effective April 19, 1973

EXHIBIT F
FEDERAL RESERVE BRIEF

JA 17

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Any inquiry relating to this regulation should be addressed to the Federal Reserve Bank of the Federal Reserve District in which the inquiry arises.

EXHIBIT F
FEDERAL RESERVE BRIEF

REGULATION A

JA 18

(12 CFR 201)

As amended effective April 19, 1973

EXTENSIONS OF CREDIT BY FEDERAL RESERVE BANKS

SECTION 201.1—AUTHORITY AND SCOPE

This Part is issued under section 13 and other provisions of the Federal Reserve Act and relates to extensions of credit by Federal Reserve Banks.

SECTION 201.2—GENERAL PRINCIPLES

(a) **Accommodation of credit needs of individual banks.** Extending credit to member banks to accommodate commerce, industry, and agriculture is a principal function of Reserve Banks. While open market operations and changes in member bank reserve requirements are important means of affecting the overall supply of bank reserves, the lending function of the Reserve Banks is an effective method of supplying reserves to meet the particular needs of individual member banks.

(b) **Effect on overall monetary and credit conditions.** The lending functions of the Federal Reserve System are conducted with due regard to the basic objectives of the Employment Act of 1946 and the maintenance of a sound and orderly financial system. These basic objectives are promoted by influencing the overall volume and cost of credit through actions affecting the volume and cost of reserves to member banks. Borrowing by individual member banks, at a rate of interest adjusted from time to time in accordance with general economic and money market conditions, has a direct impact on the reserve positions of the borrowing banks and thus on their ability to meet the needs of their customers. However, the effects of such borrowing do not remain localized but have an important bearing on overall monetary and credit conditions.

(c) **Short-term adjustment credit.** Federal Reserve credit is available on a short-term basis to a member bank, under such rules as may be prescribed, to such extent as may be appropriate to assist such bank in meeting temporary requirements for funds or to cushion more persistent outflows of funds pending an orderly adjustment of the bank's assets and liabilities.

(d) **Seasonal credit.** Federal Reserve credit is available for longer periods to assist a member bank that lacks reasonably reliable access to national money markets in meeting seasonal needs for funds arising from a combination of expected patterns of movement in its deposits and loans. Such credit will ordinarily be limited to the amount by which the member bank's seasonal needs exceed 5 per cent of its average total deposits in the preceding calendar year and will be available if (1) the member bank has arranged in advance for such credit for the full period, as far as possible, for which the credit is expected to be required, and (2) the Reserve Bank is satisfied that the member bank's qualifying need for funds is seasonal and will persist for at least eight consecutive weeks. In making such arrangements for seasonal credit, a Reserve Bank may agree to extend such credit for a period of up to 90 days,[1] subject to compliance with applicable requirements of law at the time such credit is extended. However, in the event that a member bank's seasonal needs should persist beyond such period, the Reserve Bank will normally be prepared to entertain a request by the member bank

[1] As provided in the law and in this Part, the maturity of advances to member banks is limited to 90 days, except as provided in §201.3(b) of this Part.

for further credit extensions under the seasonal credit arrangement.

(e) **Emergency credit for member banks.** Federal Reserve credit is available to assist member banks in unusual or emergency circumstances such as may result from national, regional, or local difficulties or from exceptional circumstances involving only a particular member bank.

(f) **Emergency credit for others.** Federal Reserve credit is available to individuals, partnerships, and corporations that are not member banks in emergency circumstances in accordance with §201.7 of this Part if, in the judgment of the Reserve Bank involved, credit is not practicably available from other sources and failure to obtain such credit would adversely affect the economy.

(g) **Credit for capital purposes.** Federal Reserve credit is not a substitute for capital and ordinarily is not available for extended periods.

(h) **Compliance with law and regulation.** All credit extended pursuant to this Part must comply with applicable requirements of law and of this Part. Among other things, the law requires each Reserve Bank (1) to keep itself informed of the general character and amount of the loans and investments of its member banks with a view to ascertaining whether undue use is being made of bank credit for the speculative carrying of or trading in securities, real estate, or commodities or for any other purpose inconsistent with the maintenance of sound credit conditions and (2) to give consideration to such information in determining whether to extend credit.

SECTION 201.3—ADVANCES TO MEMBER BANKS

(a) **Advances on obligations or eligible paper.** Reserve Banks may make advances to member banks for not more than 90 days if secured by obligations or other paper eligible under the Federal Reserve Act for discount or purchase by Reserve Banks.

(b) **Advances on other security.** A Reserve Bank may make advances to a member bank for not more than four months if secured to the satisfaction of the Reserve Bank, whether or not secured in conformity with §201.3(a), but the rate on such advances shall be at least one-half of one per cent per annum higher than the rate applicable to advances made under §201.3(a).

SECTION 201.4—DISCOUNTS FOR MEMBER BANKS

If a Reserve Bank should conclude that a member bank would be better accommodated by the discount of paper than by an advance on the security thereof, it may discount for such member bank any paper endorsed by the member bank and meeting the following requirements:

(a) **Commercial or agricultural paper.** A note, draft, or bill of exchange issued or drawn or the proceeds of which have been or are to be used (1) in producing, purchasing, carrying, or marketing goods in the process of production, manufacture, or distribution, (2) for the purchase of services, (3) in meeting current operating expenses of a commercial, agricultural, or industrial business, or (4) for the purpose of carrying or trading in direct obligations of the United States; provided that (i) such paper has a period remaining to maturity of not more than 90 days, except that agricultural paper (including paper of cooperative marketing associations) may have a period remaining to maturity of not more than nine months and (ii) the proceeds of such paper have not been and are not to be used merely for the purpose of investment, speculation, or dealing in stocks, bonds, or other such securities, except direct obligations of the United States.

(b) **Bankers' acceptances.** A banker's acceptance (1) arising out of an importation or exportation or domestic shipment of goods or the storage of readily marketable staples or (2) drawn by a bank in a foreign country or dependency or insular possession of the United States for the purpose of furnishing dollar exchange; provided that such acceptance complies with applicable requirements of section 13 of the Federal Reserve Act.

(c) **Construction paper.** A note representing a loan made to finance construction of a residential or farm building, whether or not secured by a lien upon real estate, which matures not more than nine months from the date the loan was made and has a period remaining to maturity of not more than 90 days, if accompanied by an agreement

requiring some person acceptable to the Reserve Bank to advance the full amount of the loan upon completion of such construction.

SECTION 201.5—GENERAL REQUIREMENTS

(a) **Information.** A Reserve Bank shall require such information as it deems necessary to insure that paper tendered as collateral or for discount is acceptable and meets any pertinent eligibility requirements and that the credit granted is used consistently with this Part.

(b) **Amount of collateral.** A Reserve Bank shall require only such amount of collateral as it deems necessary or advisable.

(c) **Indirect credit for nonmember banks.** Except with the permission of the Board of Governors, no member bank shall act as the medium or agent of a nonmember bank (other than a Federal Intermediate Credit bank) in receiving credit from a Reserve Bank and, in the absence of such permission, a member bank applying for credit shall be deemed to represent and guarantee that it is not so acting.

(d) **Limitation as to one obligor.** Except as to credit granted under §201.3(b), a member bank applying for credit shall be deemed to certify or guarantee that as long as the credit is outstanding no obligor on paper tendered as collateral or for discount will be indebted to it in an amount exceeding the limitations in section 5200 of the Revised Statutes (12 U.S.C. §84), which for this purpose shall be deemed to apply to State member as well as national banks.

SECTION 201.6—FEDERAL INTERMEDIATE CREDIT BANKS

A Reserve Bank may discount for any Federal Intermediate Credit bank (1) agricultural paper, or (2) notes payable to and bearing the endorsement of such Federal Intermediate Credit bank covering loans or advances made under subsections (a) and (b) of §2.3 of the Farm Credit Act of 1971 (12 U.S.C. §2074) which are secured by paper eligible for discount by Reserve Banks. Any paper so discounted shall not have a period remaining to maturity of more than nine months or bear the endorsement of a nonmember State bank.

SECTION 201.7—EMERGENCY CREDIT FOR OTHERS

In emergency circumstances a Reserve Bank may extend credit for periods of not more than 90 days to individuals, partnerships, and corporations (other than member banks) on the security of direct obligations of the United States or any obligations which are direct obligations of, or fully guaranteed as to principal and interest by, any agency of the United States, at such rate in excess of the rate in effect at the Reserve Bank for advances under §201.3(a) as its board of directors may establish subject to review and determination of the Board of Governors.

STATUTORY APPENDIX

SECTION 13 OF THE FEDERAL RESERVE ACT

Section 13 provides in part as follows:[1]

* * * * *

2. Discount of commercial, agricultural, and industrial paper

Upon the indorsement of any of its member banks, which shall be deemed a waiver of demand, notice and protest by such bank as to its own indorsement exclusively, any Federal reserve bank may discount notes, drafts, and bills of exchange arising out of actual commercial transactions; that is, notes, drafts, and bills of exchange issued or drawn for agricultural, industrial, or commercial purposes, or the proceeds of which have been used, or are to be used, for such purposes, the Board of Governors of the Federal Reserve System to have the right to determine or define the character of the paper thus eligible for discount, within the meaning of this Act. Nothing in this Act contained shall be construed to prohibit such notes, drafts, and bills of exchange, secured by staple agricultural products, or other goods, wares, or merchandise from being eligible for such discount, and the notes, drafts, and bills of exchange of factors issued as such making advances exclusively to producers of staple agricultural products in their raw state shall be eligible for such discount; but such definition shall not include notes, drafts, or bills covering merely investments or issued or drawn for the purpose of carrying or trading in stocks, bonds, or other investment securities, except bonds and notes of the Government of the United States. Notes, drafts, and bills admitted to discount under the terms of this paragraph must have a maturity at the time of discount of not more than 90 days, exclusive of grace.

[U. S. C., title 12, sec. 343. As used in this paragraph the phrase "bonds and notes of the Government of the United States" includes Treasury bills or certificates of indebtedness.]

* * * * *

[1] Paragraph numbers and captions have been added to facilitate reference.

4. Discount or purchase of sight drafts

Upon the indorsement of any of its member banks, which shall be deemed a waiver of demand, notice, and protest by such bank as to its own indorsement exclusively, and subject to regulations and limitations to be prescribed by the Board of Governors of the Federal Reserve System, any Federal reserve bank may discount or purchase bills of exchange payable at sight or on demand which grow out of the domestic shipment or the exportation of nonperishable, readily marketable agricultural and other staples and are secured by bills of lading or other shipping documents conveying or securing title to such staples: *Provided,* That all such bills of exchange shall be forwarded promptly for collection, and demand for payment shall be made with reasonable promptness after the arrival of such staples at their destination: *Provided further,* That no such bill shall in any event be held by or for the account of a Federal reserve bank for a period in excess of ninety days. In discounting such bills Federal reserve banks may compute the interest to be deducted on the basis of the estimated life of each bill and adjust the discount after payment of such bills to conform to the actual life thereof.

[U. S. C., title 12, sec. 344.]

5. Limitation on discount of paper of one borrower

The aggregate of notes, drafts, and bills upon which any person, copartnership, association, or corporation is liable as maker, acceptor, indorser, drawer, or guarantor, rediscounted for any member bank, shall at no time exceed the amount for which such person, copartnership, association, or corporation may lawfully become liable to a national banking association under the terms of section 5200 of the Revised Statutes, as amended: *Provided, however,* That nothing in this paragraph shall be construed to change the character or class of paper now eligible for rediscount by Federal reserve banks.

[U. S. C., title 12, sec. 345.]

6. Discount of acceptances

Any Federal reserve bank may discount acceptances of the kinds hereinafter described, which have a maturity at the time of discount

of not more than 90 days' sight, exclusive of days of grace, and which are indorsed by at least one member bank: *Provided*, That such acceptances if drawn for an agricultural purpose and secured at the time of acceptance by warehouse receipts or other such documents conveying or securing title covering readily marketable staples may be discounted with a maturity at the time of discount of not more than six months' sight exclusive of days of grace.

[U. S. C., title 12, sec. 346.]

7. Acceptances by member banks

Any member bank may accept drafts or bills of exchange drawn upon it having not more than six months sight to run, exclusive of days of grace, which grow out of transactions involving the importation or exportation of goods; or which grow out of transactions involving the domestic shipment of goods provided shipping documents conveying or securing title are attached at the time of acceptance; or which are secured at the time of acceptance by a warehouse receipt or other such document conveying or securing title covering readily marketable staples. * * *

[U. S. C., title 12, sec. 372.]

8. Advances to member banks on promissory notes

Any Federal reserve bank may make advances for periods not exceeding fifteen days to its member banks on their promissory notes secured by the deposit or pledge of bonds, notes, certificates of indebtedness, or Treasury bills of the United States, or by the deposit or pledge of debentures or other such obligations of Federal intermediate credit banks which are eligible for purchase by Federal reserve banks under section 13 (a) of this Act, or by the deposit or pledge of bonds issued under the provisions of subsection (c) of section 4 of the Home Owners' Loan Act of 1933, as amended; and any Federal reserve bank may make advances for periods not exceeding ninety days to its member banks on their promissory notes secured by such notes, drafts, bills of exchange, or bankers' acceptances as are eligible for rediscount or for purchase by Federal reserve banks under the provisions of this Act, or secured by such obligations as are eligible for purchase under section 14(b) of this Act. All such advances shall be made at rates to be established by such Federal reserve banks, such rates to be subject to the review and determination of the Board of Governors of the Federal Reserve System. If any member bank to which any such advance has been made shall, during the life or continuance of such advance, and despite an official warning of the reserve bank of the district or of the Board of Governors of the Federal Reserve System to the contrary, increase its outstanding loans secured by collateral in the form of stocks, bonds, debentures, or other such obligations, or loans made to members of any organized stock exchange, investment house, or dealer in securities, upon any obligation, note, or bill, secured or unsecured, for the purpose of purchasing and/or carrying stocks, bonds, or other investment securities (except obligations of the United States) such advance shall be deemed immediately due and payable, and such member bank shall be ineligible as a borrower at the reserve bank of the district under the provisions of this paragraph for such period as the Board of Governors of the Federal Reserve System shall determine: *Provided*, That no temporary carrying or clearance loans made solely for the purpose of facilitating the purchase or delivery of securities offered for public subscription shall be included in the loans referred to in this paragraph.

[U. S. C., title 12, sec. 347.]

* * * * *

10. Regulation by Board of Governors of discounts, purchases and sales

The discount and rediscount and the purchase and sale by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Board of Governors of the Federal Reserve System.

[Omitted from U.S. Code.]

* * * * *

12. Bank acceptances to create dollar exchange

Any member bank may accept drafts or bills of exchange drawn upon it having not more than

three months' sight to run, exclusive of days of grace, drawn under regulations to be prescribed by the Board of Governors of the Federal Reserve System by banks or bankers in foreign countries or dependencies or insular possessions of the United States for the purpose of furnishing dollar exchange as required by the usages of trade in the respective countries, dependencies, or insular possessions. Such draft or bills may be acquired by Federal reserve banks in such amounts and subject to such regulations, restrictions, and limitations as may be prescribed by the Board of Governors of the Federal Reserve System: * * *

[Omitted from U.S. Code.]

13. Advances to individuals, partnerships, and corporations on direct obligations of United States

Subject to such limitations, restrictions and regulations as the Board of Governors of the Federal Reserve System may prescribe, any Federal reserve bank may make advances to any individual, partnership or corporation on the promissory notes of such individual, partnership or corporation secured by direct obligations of the United States or by any obligation which is a direct obligation of, or fully guaranteed as to principal and interest by, any agencies of the United States. Such advances shall be made for periods not exceeding 90 days and shall bear interest at rates fixed from time to time by the Federal reserve bank, subject to the review and determination of the Board of Governors of the Federal Reserve System.

[U. S. C., title 12, sec. 347c.]

SECTION 13a OF THE FEDERAL RESERVE ACT

Section 13a provides in part as follows:

1. Authority of Federal reserve banks to discount agricultural paper

Sec. 13a. Upon the indorsement of any of its member banks, which shall be deemed a waiver of demand, notice, and protest by such bank as to its own indorsement exclusively, any Federal reserve bank may, subject to regulations and limitations to be prescribed by the Board of Governors of the Federal Reserve System, discount notes, drafts, and bills of exchange issued or drawn for an agricultural purpose, or based upon live stock, and having a maturity, at the time of discount, exclusive of days of grace, not exceeding nine months, * * *

[U. S. C., title 12, sec. 348.]

2. Rediscounts for, and discount of notes payable to, Federal Intermediate Credit Banks

That any Federal reserve bank may, subject to regulations and limitations to be prescribed by the Board of Governors of the Federal Reserve System, rediscount such notes, drafts, and bills for any Federal Intermediate Credit Bank, except that no Federal reserve bank shall rediscount for a Federal Intermediate Credit Bank any such note or obligation which bears the indorsement of a nonmember State bank or trust company which is eligible for membership in the Federal reserve system, in accordance with section 9 of this Act. Any Federal reserve bank may also, subject to regulations and limitations to be prescribed by the Board of Governors of the Federal Reserve System, discount notes payable to and bearing the indorsement of any Federal intermediate credit bank, covering loans or advances made by such bank pursuant to the provisions of section 202(a) of Title II of the Federal Farm Loan Act, as amended (U.S.C., title 12, ch. 8, sec. 1031), which have maturities at the time of discount of not more than nine months, exclusive of days of grace, and which are secured by notes, drafts, or bills of exchange eligible for rediscount by Federal Reserve banks.

[U. S. C., title 12, sec. 349.]

* * * * *

4. Paper of cooperative marketing associations

Notes, drafts, bills of exchange or acceptances issued or drawn by cooperative marketing associations composed of producers of agricultural products shall be deemed to have been issued or drawn for an agricultural purpose, within the meaning of this section, if the proceeds thereof have been or are to be advanced by such association to any members thereof for an agricultural purpose, or have been or are to be used by such association in making payments to any members thereof on account of agricultural products delivered by such members to the association, or if such proceeds have been or are to

be used by such association to meet expenditures incurred or to be incurred by the association in connection with the grading, processing, packing, preparation for market, or marketing of any agricultural product handled by such association for any of its members: *Provided,* That the express enumeration in this paragraph of certain classes of paper of cooperative marketing associations as eligible for rediscount shall not be construed as rendering ineligible any other class of paper of such associations which is now eligible for rediscount.

[U. S. C., title 12, sec. 351.]

5. Limitations

The Board of Governors of the Federal Reserve System may, by regulation, limit to a percentage of the assets of a Federal reserve bank the amount of notes, drafts, acceptances, or bills having a maturity in excess of three months, but not exceeding six months, exclusive of days of grace, which may be discounted by such bank, and the amount of notes, drafts, bills, or acceptances having a maturity in excess of six months, but not exceeding nine months, which may be rediscounted by such bank.

[U. S. C., title 12, sec. 352.]

OTHER RELATED STATUTORY PROVISIONS

The eighth paragraph of section 4 of the Federal Reserve Act provides as follows:

Said board of directors shall administer the affairs of said bank fairly and impartially and without discrimination in favor of or against any member bank or banks and may, subject to the provisions of law and the orders of the Board of Governors of the Federal Reserve System, extend to each member bank such discounts, advancements, and accommodations as may be safely and reasonably made with due regard for the claims and demands of other member banks, the maintenance of sound credit conditions, and the accommodation of commerce, industry, and agriculture. The Board of Governors of the Federal Reserve System may prescribe regulations further defining within the limitations of this Act the conditions under which discounts, advancements, and the accommodations may be extended to member banks. Each Federal reserve bank shall keep itself informed of the general character and amount of the loans and investments of its member banks with a view to ascertaining whether undue use is being made of bank credit for the speculative carrying of or trading in securities, real estate, or commodities, or for any other purpose inconsistent with the maintenance of sound credit conditions; and, in determining whether to grant or refuse advances, rediscounts or other credit accommodations, the Federal reserve bank shall give consideration to such information. The chairman of the Federal reserve bank shall report to the Board of Governors of the Federal Reserve System any such undue use of bank credit by any member bank, together with his recommendation. Whenever, in the judgment of the Board of Governors of the Federal Reserve System, any member bank is making such undue use of bank credit, the Board may, in its discretion, after reasonable notice and an opportunity for a hearing, suspend such bank from the use of the credit facilities of the Federal Reserve System and may terminate such suspension or may renew it from time to time.

[U. S. C., title 12, sec. 301.]

The thirteenth paragraph of section 9 of the Federal Reserve Act provides in part as follows:

* * * *Provided, however,* That no Federal reserve bank shall be permitted to discount for any State bank or trust company notes, drafts, or bills of exchange of any one borrower who is liable for borrowed money to such State bank or trust company in an amount greater than that which could be borrowed lawfully from such State bank or trust company were it a national banking association. The Federal reserve bank, as a condition of the discount of notes, drafts, and bills of exchange for such State bank or trust company, shall require a certificate or guaranty to the effect that the borrower is not liable to such bank in excess of the amount provided by this section, and will not be permitted to become liable in excess of this amount while such notes, drafts, or bills of exchange are under discount with the Federal reserve bank.

[U. S. C., title 12, sec. 330.]

Section 10(b) of the Federal Reserve Act provides as follows:

Sec. 10(b). Any Federal Reserve bank, under rules and regulations prescribed by the Board of Governors of the Federal Reserve System, may make advances to any member bank on its time or demand notes having maturities of not more than four months and which are secured to the satisfaction of such Federal Reserve bank. Each such note shall bear interest at a rate not less than one-half of 1 per centum per annum higher than the highest discount rate in effect at such Federal Reserve bank on the date of such note.

[U. S. C., title 12, sec. 347b.]

Section 19 (c) of the Federal Reserve Act provides in part as follows:

(c) * * * No member bank shall act as the medium or agent of a nonmember bank in applying for or receiving discounts from a Federal reserve bank under the provisions of this Act, except by permission of the Board of Governors of the Federal Reserve System.

[U. S. C., title 12, secs. 463, 374.]

The third paragraph of section 24 of the Federal Reserve Act provides as follows:

Loans made to finance the construction of industrial or commercial buildings and having maturities of not to exceed sixty months where there is a valid and binding agreement entered into by a financially responsible lender to advance the full amount of the bank's loan upon the completion of the buildings and loans made to finance the construction of residential or farm buildings and having maturities of not to exceed sixty months, shall not be considered as loans secured by real estate within the meaning of this section but shall be classed as ordinary commercial loans whether or not secured by a mortgage or similar lien on the real estate upon which the building or buildings are being constructed: *Provided*, That no national banking association shall invest in, or be liable on, any such loans in an aggregate amount in excess of 100 per centum of its actually paid-in and unimpaired capital plus 100 per centum of its unimpaired surplus fund. Notes representing loans made under this section to finance the construction of residential or farm buildings and having maturities of not to exceed nine months shall be eligible for discount as commercial paper within the terms of the second paragraph of section 13 of this Act if accompanied by a valid and binding agreement to advance the full amount of the loan upon the completion of the building entered into by an individual, partnership, association, or corporation acceptable to the discounting bank.

[U. S. C., title 12, sec. 371.]

Section 5200 of the Revised Statutes provides as follows:

SEC. 5200. The total obligations to any national banking association of any person, copartnership, association, or corporation shall at no time exceed 10 per centum of the amount of the capital stock of such association actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund. The term "obligations" shall mean the direct liability of the maker or acceptor of paper discounted with or sold to such association and the liability of the indorser, drawer, or guarantor who obtains a loan from or discounts paper with or sells paper under his guaranty to such association and shall include in the case of obligations of a copartnership or association the obligations of the several members thereof and shall include in the case of obligations of a corporation all obligations of all subsidiaries thereof in which such corporation owns or controls a majority interest. Such limitation of 10 per centum shall be subject to the following exceptions:

(1) Obligations in the form of drafts or bills of exchange drawn in good faith against actually existing values shall not be subject under this section to any limitation based upon such capital and surplus.

(2) Obligations arising out of the discount of commercial or business paper actually owned by the person, copartnership, association, or corporation negotiating the same shall not be subject under this section to any limitation based upon such capital and surplus.

(3) Obligations drawn in good faith against actually existing values and secured by goods or

commodities in process of shipment shall not be subject under this section to any limitation based upon such capital and surplus.

(4) Obligations as indorser or guarantor of notes, other than commercial or business paper excepted under (2) hereof, having a maturity of not more than six months, and owned by the person, corporation, association, or copartnership indorsing and negotiating the same, shall be subject under this section to a limitation of 15 per centum of such capital and surplus in addition to such 10 per centum of such capital and surplus.

(5) Obligations in the form of banker's acceptances of other banks of the kind described in section 13 of the Federal Reserve Act shall not be subject under this section to any limitation based upon such capital and surplus.

(6) Obligations of any person, copartnership, association, or corporation, in the form of notes or drafts secured by shipping documents, warehouse receipts, or other such documents transferring or securing title covering readily marketable nonperishable staples when such property is fully covered by insurance, if it is customary to insure such staples, shall be subject under this section to a limitation of 15 per centum of such capital and surplus in addition to such 10 per centum of such capital and surplus when the market value of such staples securing such obligation is not any time less than 115 per centum of the face amount of such obligation, and to an additional increase of limitation of 5 per centum of such capital and surplus in addition to such 25 per centum of such capital and surplus when the market value of such staples securing such additional obligation is not at any time less than 120 per centum of the face amount of such additional obligation, and to a further additional increase of limitation of 5 per centum of such capital and surplus in addition to such 30 per centum of such capital and surplus when the market value of such staples securing such additional obligation is not at any time less than 125 per centum of the face amount of such additional obligation, and to a further additional increase of limitation of 5 per centum of such capital and surplus in addition to such 35 per centum of such capital and surplus when the market value of such staples securing such additional obligation is not at any time less than 130 per centum of the face amount of such additional obligation, and to a further additional increase of limitation of 5 per centum of such capital and surplus in addition to such 40 per centum of such capital and surplus when the market value of such staples securing such additional obligation is not at any time less than 135 per centum of the face amount of such additional obligation, and to a further additional increase of limitation of 5 per centum of such capital and surplus in addition to such 45 per centum of such capital and surplus when the market value of such staples securing such additional obligation is not at any time less than 140 per centum of the face amount of such additional obligation, but this exception shall not apply to obligations of any one person, copartnership, association, or corporation arising from the same transactions and/or secured by the identical staples for more than ten months. Obligations of any person, copartnership, association, or corporation in the form of notes or drafts secured by shipping documents, warehouse receipts, or other such documents transferring or securing title covering refrigerated or frozen readily marketable staples when such property is fully covered by insurance, shall be subject under this section to a limitation of 15 per centum of such capital and surplus in addition to such 10 per centum of such capital and surplus when the market value of such staples securing such obligation is not at any time less than 115 per centum of the face amount of such additional obligation, but this exception shall not apply to obligations of any one person, copartnership, association, or corporation arising from the same transactions and/or secured by the identical staples for more than six months.

(7) Obligations of any person, copartnership, association, or corporation in the form of notes or drafts secured by shipping documents or instruments transferring or securing title covering livestock or giving a lien on livestock when the market value of the livestock securing the obligation is not at any time less than 115 per

centum of the face amount of the notes covered by such documents shall be subject under this section to a limitation of 15 per centum of such capital and surplus in addition to such 10 per centum of such capital and surplus. Obligations arising out of the discount by dealers in dairy cattle of paper given in payment for dairy cattle, which bear a full recourse endorsement or unconditional guarantee of the seller and are secured by the cattle being sold, shall be subject under this section to a limitation of 15 per centum of such capital and surplus in addition to such 10 per centum of such capital and surplus.

(8) Obligations of any person, copartnership, association, or corporation secured by not less than a like amount of bonds or notes of the United States issued since April 24, 1917, or certificates of indebtedness of the United States, Treasury bills of the United States, or obligations fully guaranteed both as to principal and interest by the United States, shall (except to the extent permitted by rules and regulations prescribed by the Comptroller of the Currency, with the approval of the Secretary of the Treasury) be subject under this section to a limitation of 15 per centum of such capital and surplus in addition to such 10 per centum of such capital and surplus.

(9) Obligations representing loans to any national banking association or to any banking institution organized under the laws of any State, or to any receiver, conservator, or superintendent of banks, or to any other agent, in charge of the business and property of any such association or banking institution, when such loans are approved by the Comptroller of the Currency, shall not be subject under this section to any limitation based upon such capital and surplus.

(10) Obligations shall not be subject under this section to any limitation based upon such capital and surplus to the extent that such obligations are secured or covered by guaranties, or by commitments or agreements to take over or to purchase, made by any Federal Reserve bank or by the United States or any department, bureau, board, commission, or establishment of the United States, including any corporation wholly owned directly or indirectly by the United States: *Provided*, That such guaranties, agreements, or commitments are unconditional and must be performed by payment of cash or its equivalent within sixty days after demand. The Comptroller of the Currency is hereby authorized to define the terms herein used if and when he may deem it necessary.

(11) Obligations of a local public agency (as defined in section 110 (h) of the Housing Act of 1949) or of a public housing agency (as defined in the United States Housing Act of 1937, as amended) which have a maturity of not more than eighteen months shall not be subject under this section to any limitation, if such obligations are secured by an agreement between the obligor agency and the Secretary of Housing and Urban Development in which the agency agrees to borrow from the Secretary and the Secretary agrees to lend to the agency, prior to the maturity of such obligations, monies in an amount which (together with any other monies irrevocably committed to the payment of interest on such obligations) will suffice to pay the principal of such obligations with interest to maturity, which monies under the terms of said agreement are required to be used for that purpose.

(12) Obligations insured by the Secretary of Agriculture pursuant to the Bankhead-Jones Farm Tenant Act, as amended, or the Act of August 28, 1937, as amended (relating to the conservation of water resources), or title V of the Housing Act of 1949, shall be subject under this section to a limitation of 15 per centum of such capital and surplus in addition to such 10 per centum of such capital and surplus.

(13) Obligations as endorser or guarantor of negotiable or nonnegotiable installment consumer paper which carries a full recourse endorsement or unconditional guarantee by the person, copartnership, association, or corporation transferring the same, shall be subject under this section to a limitation of 15 per centum of such capital and surplus in addition to such 10 per centum of such capital and surplus: *Provided, however*, That if the bank's files or the knowledge of its officers of the financial condition of

each maker of such obligations is reasonably adequate, and upon certification by an officer of the bank designated for that purpose by the board of directors of the bank, that the responsibility of each maker of such obligations has been evaluated and the bank is relying primarily upon each such maker for the payment of such obligations, the limitations of this section as to the obligations of each such maker shall be the sole applicable loan limitation: *Provided further,* That such certification shall be in writing and shall be retained as part of the records of such bank.

[U. S. C., title 12, sec. 84.]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- x

HUNTINGTON TOWERS, LTD. and RICHARD CAREY,

Plaintiffs,

-against-

75 Civ. 972 (OGJ)

FRANKLIN NATIONAL BANK (in Liquidation), FEDERAL DEPOSIT INSURANCE CORPORATION, FEDERAL RESERVE BANK OF NEW YORK, EUROPEAN-AMERICAN BANK and JAMES SMITH, individually and as Comptroller of the Currency,

Defendants.

NOTICE OF MOTION

- x

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavits of Hamilton F. Potter, Jr., sworn to September 8, 1975 and of George O. Rilke, sworn to September 8, 1975, and upon all papers heretofore served herein, the undersigned will move in this Court on September 19, 1975 at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order pursuant to F.R. Civ. P. 12(b)(6) dismissing the complaint or, in the alternative, pursuant to F.R. Civ. P. 56 for summary judgment, and for such other, further and different relief as to the Court may seem just and proper.

NOTICE OF MOTION
OF EUROPEAN-AMERICAN BANK

PLEASE TAKE FURTHER NOTICE that pursuant to the rules of this Court all opposing affidavits and answering memoranda must be served by September 16, 1975.

SULLIVAN & CROMWELL

By _____
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Receiver of Franklin National
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AFFIDAVIT OF
HAMILTON POTTER
IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

HUNTINGTON TOWERS, LTD. and RICHARD CAREY, Plaintiffs, -against- FRANKLIN NATIONAL BANK (in Liquidation), FEDERAL DEPOSIT INSURANCE CORPORATION, FEDERAL RESERVE BANK OF NEW YORK, EUROPEAN-AMERICAN BANK and JAMES SMITH, individually and as Comptroller of the Currency, Defendants.	75 Civ. 972 (OGJ) AFFIDAVIT

HAMILTON F. POTTER, JR., being duly sowrn, deposes and says:

1. I am a member of the Bar of this Court and of the firm of Sullivan & Cromwell, attorneys for European-American Bank & Trust Company (hereinafter "European-American"). I represented European-American in connection with the purchase from the Federal Deposit Insurance Corporation (hereinafter "FDIC") of certain assets formerly owned by Franklin National Bank (hereinafter "Franklin") and as such am familiar with the facts and circumstances relating to the purchase. I submit this affidavit in opposition to plaintiffs' claim that European-American, in concert with the other defendants, engaged in actions "contrary to law" (Complaint, ¶ 21).

2. Plaintiffs allege in their Second Claim that European-American "entered into an agreement disposing of

such "arrangements . . . are contrary to law" and conclude thereby that European-American has liability to plaintiffs. Even if the "arrangements" referred to by plaintiffs are ultimately found to be unlawful, it is European-American's position that, as a good faith purchaser for value of certain assets of Franklin, it has no liability to the creditors of Franklin, except concerning assets expressly assumed in the Purchase and Assumption Agreement, discussed below.

3. On October 8, 1974 the Comptroller of the Currency declared Franklin insolvent, terminated its powers as a national banking association and appointed the FDIC as receiver pursuant to 12 U.S.C. §§ 191 and 1821(c). The FDIC as receiver solicited bids from other banking institutions, including European-American. After extensive preparatory work by all parties and after considering four bids, the Board of Directors of the FDIC accepted the bid of European-American, contingent upon court approval pursuant to 12 U.S.C. § 192. On October 8, 1974, the United States District Court for the Eastern District of New York approved the bid.

4. Subsequent to the court's approval, a Purchase and Assumption Agreement between European-American and the FDIC as receiver was executed. In this agreement European-American assumed certain specific liabilities which are set forth in Section 2 of the Purchase and Assumption Agreement (attached hereto as Exhibit A). Under the agreement European-American assumed certain assets of Franklin and, dollar for dollar, certain offsetting liabilities. In addition, European-American agreed to assume $125 million of liabili-

5. Included in the liabilities assumed were all of Franklin's deposit liabilities and certain other non-subordinated balance sheet liabilities. The liability alleged in the present litigation is not included in the agreement, which specifically states in § 2.1 that European-American assumed only those liabilities expressly set forth in the agreement:

> "[t]he assuming bank expressly assumes . . . the following liabilities . . . and none other . . . ."

The agreement does not provide that European-American assume any liability arising from the manner in which the assets were distributed. Since European-American did not assume such a liability, and since the uncontrovertible facts are that European-American acted in good faith and paid value, it has no liability to any party complaining of the manner in which the receiver disposed of Franklin's assets.

6. European-American thus purchased certain of Franklin's assets from Franklin's receiver the FDIC. The transaction was negotiated and consummated at arm's length and European-American paid dollar for dollar for the assets received, in addition to a $125 million premium. As a result of the manner in which the sale was transacted, all of the branches formerly operated by Franklin National Bank were opened the day after the Comptroller of the Currency declared Franklin insolvent.

HAMILTON F. POTTER, JR.

Sworn to before me this
8th day of September, 1975.

Notary Public

RITA G. MOZDEAN
NOTARY PUBLIC, STATE OF NEW YORK
Residing in Queens County

AFFIDAVIT OF GEORGE RILKE
IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

HUNTINGTON TOWERS, LTD. and RICHARD CAREY, Plaintiffs,	:	75 Civ. 909 (OGJ)
-against-	:	
FRANKLIN NATIONAL BANK (in liquidation), FEDERAL DEPOSIT INSURANCE CORPORATION, FEDERAL RESERVE BANK OF NEW YORK, EUROPEAN-AMERICAN BANK & TRUST COMPANY and JAMES SMITH, individually and as Comptroller of the Currency, Defendants.	:	AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

GEORGE O. RILKE, being duly sworn, deposes and says:

1. I am a vice president of defendant European-American Bank & Trust Company ("European-American"). I was formerly employed as vice president of Franklin National Bank ("Franklin") and as such was the officer in charge of the account of plaintiffs. To the limited extent that European-American continued to deal with plaintiffs, I was also in charge of such dealings. I am familiar with the allegations set forth in plaintiffs' complaint and submit this affidavit in support of the motion by European-American for summary judgment.

2. There is no writing of any form in the files of European-American that evidences any agreement by European-American to provide continued financing to plaintiffs. To my knowledge such a writing does not exist.

3. Plaintiffs had only one business dealing with European-American concerning their construction projects. On October 18, 1974, plaintiffs signed note for $100,000 payable within one month and pursuant

to this loan European-American issued a check to Ikenson Iron Works, Inc. in the amount of $100,000 on behalf of Huntington Towers, Ltd. There is no contract or other writing evidencing the agreement to make this loan except the note signed by plaintiffs. I had direct involvement in this transaction and I gave no assurances that financing would continue nor was any agreement signed to that effect. The loan is presently in default.

4. As officer in charge of plaintiffs' account at Franklin National Bank, I was generally familiar with the timetables for construction of plaintiffs' real estate project. The projects upon which plaintiffs sought continued financing in October 1974 were not, to my best knowledge, scheduled for completion before November 1975 and any agreement to finance such a project would necessarily have been longer than one year in duration.

George O. Rilke

Sworn to before me this
8th day of September, 1975.

ARTHUR LAWRENCE
Notary Public, State of New York
No. 52-4519422
Qualified in Suffolk County
Commission Expires March 30, 1976

EXHIBIT A - HAMILTON POTTER [CONFORMED]
AFFIDAVIT - PURCHASE AND ASSUMPTION AGREEMENT

Purchase and Assumption Agreement

Dated: October 8, 1974

PURCHASE AND ASSUMPTION AGREEMENT

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THIS PURCHASE AND ASSUMPTION AGREEMENT, made and entered into as of 3:00 p.m. (Eastern Daylight Time) the 8th day of October, 1974 by and between the Federal Deposit Insurance Corporation (the "Corporation") as receiver of the Franklin National Bank (the "Bank"), the Bank acting through said receiver (together, the "Receiver") and European-American Bank & Trust Company a New York trust company (the "Assuming Bank").

WITNESSETH:

WHEREAS, the Bank has been closed by the Comptroller of the Currency as of 3:00 p.m. (Eastern Daylight Time) on October 8, 1974 (the "Bank Closing");

WHEREAS, the Comptroller of the Currency, in accordance with 12 U.S.C. §191 and 12 U.S.C. §1821(c), has appointed the Corporation to be the Receiver;

WHEREAS, by operation of law the Receiver has succeeded to the exclusive dominion and control over all of the assets of the Bank and is the sole authorized agent in law of the Bank;

WHEREAS, it is in the best interests of the public, the depositors and other creditors of the Bank, and necessary to meet the convenience and needs of the communities served by the Bank, that certain of the assets and liabilities of the Bank be transferred to and assumed by another bank as soon as possible;

WHEREAS, to that end the Assuming Bank has indicated its willingness to acquire assets and assume liabilities as hereinafter provided;

WHEREAS, the Bank is indebted to the Federal Reserve Bank of New York (the "FRB") approximately in the principal amount of $1,723,000,000 (together with accrued and unpaid interest thereon and the obligations of the Bank under the Contract for Sale of Foreign Exchange Contracts and Foreign Currency Balances between it and the FRB dated as of September 26, 1974, the "FRB Indebtedness"), and to secure the FRB Indebtedness the Bank has granted a security interest in a substantial portion of its assets to the FRB (the "FRB Security Interest");

WHEREAS, the Assuming Bank desires to acquire the assets of the Bank which it acquires hereunder unencumbered by the FRB Security Interest;

WHEREAS, the Corporation, pursuant to 12 U.S.C. § 1823(e), in order to facilitate the consummation of the transactions contemplated hereby, is entering into agreements with the FRB and the Receiver pursuant to which the Corporation, among other things, assumes the FRB Indebtedness in consideration of the transfer by the Receiver to the Corporation of the assets of the Bank not acquired by the Assuming Bank; and

WHEREAS, the FRB, in consideration of the Corporation's assumption of the FRB Indebtedness, is releasing the FRB Security Interest in the assets being acquired by the Assuming Bank, effective as provided in subsection 3.1 hereof.

NOW, THEREFORE, in consideration of the premises and of the mutual agreements hereinafter set forth, it is hereby agreed as follows:

SECTION 1. PURCHASE AND SALE OF BANK ASSETS.

1.1 *Purchase and Sale.*

Subject to and in accordance with the terms of this Agreement, the Assuming Bank hereby purchases and acquires, and the Receiver hereby grants, sells, assigns, transfers, conveys and delivers to the Assuming Bank, all right, title and interest of the Bank and the Receiver in and to certain assets of the Bank and the Receiver having a value determined as provided in this Agreement which is equal to (i) the Book Value of the deposits and other liabilities of the Bank assumed by the Assuming Bank under subsection 2.1 hereof plus (ii) the amount of the payments under letters of credit to be reimbursed pursuant to subsection 2.3 hereof by the selection of assets plus (iii) the amount of advances on loans for the account of the Receiver to be reimbursed pursuant to subsection 3.6(g) hereof by the selection of assets, less (iv) the premium set forth in Section 19 hereof. The terms and provisions of such purchase, acquisition, grant, sale, assignment, transfer, conveyance and delivery are more fully set forth below.

1.2 *Schedules of Liabilities and Assets.*

Annexed hereto are Schedules A, B, C, D, E, F, G and H. Such Schedules set forth, on the basis of the best information now available to the Receiver, a list of all of the accounts maintained by the Bank and, for convenience only, a cross-reference from Schedule A to Schedules B, C and D and to the Exhibits thereto, if any, on which each such account appears (Schedule A), the liabilities which would be assumed under subsection 2.1 hereof (Schedule B), the assets which would be purchased under subsection 3.2 hereof (Schedules C and F), the assets which would be available for selection under subsection 3.3 hereof (in which an undivided interest would be purchased pursuant to such subsection) and the assets which would be available for purchase under Section 4 hereof (Schedule D), certain assets which would be excluded from purchase and retained by the Receiver (Schedule E), the amount of letter of credit liabilities which would be assumed under subsection 2.3 hereof (Schedule G) and the domestic branches and banking offices of the Bank (Schedule H) if the Bank Closing were as of the date set forth on such Schedules. Such Schedules shall be used and adjusted as provided in subsection 2.3 and Section 20 hereof.

1.3 *Book Value.*

The term "Book Value", when used with respect to liabilities or assets of the Bank in this Agreement, shall mean the amount stated on the books and records of the Bank as of the Bank Closing, after adjustment for depreciation where appropriate, suspense items, unposted debits and credits and after other adjustments called for by the provisions of this Agreement, including without limitation Section 20 hereof. The "Book Value" of any asset or liability which is, or is payable in, or carried on the books and records of the Bank at values denominated in, any currency other than that of the United States shall be an amount expressed in United States dollars determined at the bid, in the case of assets, or asked, in the case of liabilities, exchange rate for spot transactions in such currency quoted in the New York interbank market by The Chase Manhattan Bank, N.A. (the "Foreign Currency Appraiser") as of 9 a.m. (Eastern Daylight Time) on the first banking business day after the Bank Closing. If the Foreign Currency Appraiser did not quote any such currency as of such time, such amounts shall be determined at the fair market bid or asked, respec-

tively, exchange rate for spot transactions as of such time as determined by the Foreign Currency Appraiser in its sole discretion. The Receiver shall notify the Assuming Bank of the rates so quoted or determined as promptly as possible following the Bank Closing. Notwithstanding the foregoing, the Book Value of any asset or liability payable in any currency other than that in which it is carried on the books of the Bank shall be determined pursuant to this subsection as if it were at all times carried on the books of the Bank in the currency in which it is payable.

SECTION 2. ASSUMPTION OF LIABILITIES.

2.1 *Specific Assumption.*

Subject to and in accordance with the terms of this Agreement, the Assuming Bank expressly assumes and undertakes to pay, perform, fulfill and discharge the following liabilities of the Bank (as and to the extent shown on the books of the Bank as of the Bank Closing as adjusted as provided for in this Agreement, including without limitation Section 20 hereof) and none other, without duplication, at Book Value:

(a) All demand deposits, including without limitation: amounts due to foreign and other domestic banks; cashier's checks, certified checks, money orders and other official checks; trust deposits; and employee withheld payroll deductions; including any accrued and unpaid interest on such deposits.

(b) All time and savings deposits, including any accrued and unpaid interest thereon.

(c) All liabilities for: federal funds purchased (except the FRB Indebtedness); overdrafts on accounts maintained by the Bank with foreign and other domestic banks; securities sold under agreements to repurchase; short sales of securities; and borrowed securities; including any accrued and unpaid interest on the foregoing.

(d) All liabilities on acceptances.

(e) All accrued real estate, sales and use, social security and unemployment taxes, taxes withheld or collected from customers and all accounts payable and accrued operating expenses, includ-

ing, but not limited to, salary (exclusive of amounts incurred under any deferred executive compensation plan, contract or arrangement of the Bank), telephone, advertising and public relations expenses incurred by the Bank through the Bank Closing, but excluding all basic rent incurred by the Bank with respect to any parcel of real estate owned by FBI (as hereinafter defined) or improvement thereon.

(f) All liabilities for unissued food stamps and unremitted proceeds from the sale of food stamps.

(g) All liabilities for overpayments on personal installment, check credit and other consumer loans and credit card receivables acquired pursuant to subsection 3.2(b) hereof.

(h) All liabilities for tenants' security deposits.

2.2 *Deposits.*

As used in this Agreement, the term "deposits" shall include, but not be limited to, all uncollected items included in depositors' balances and credited on the books of the Bank subject to final payment.

2.3 *Letters of Credit.*

(a) *Assumption of Certain Letter of Credit Obligations.*

Within one day of the Bank Closing the Receiver shall deliver to the Assuming Bank a list of all letters of credit issued or confirmed by the Bank outstanding as of the Bank Closing (other than "standby letters of credit" as defined in § 7.1160(a) of the Interpretive Rulings of the Comptroller of the Currency, herein the "Ruling"). Subject to the adjustments called for by, and the other terms of, this Agreement, the Assuming Bank expressly assumes and undertakes to pay, perform, fulfill and discharge the liabilities of the Bank under all letters of credit set forth on such list. The Receiver hereby grants, sells, assigns, transfers, conveys and delivers to the Assuming Bank the entire interest of the Bank and the Receiver in and to the obligations of the account parties on the letters of credit hereby assumed and in and to any collateral securing such obligations. The term "collateral" as used herein shall be deemed to include, without limitation, the obligations of third parties, including guarantors, indemnitors, and other parties

in respect of such letters of credit. In the event of payment by the Assuming Bank to the beneficiary under any such letter of credit prior to the earlier of (i) 170 days after the Bank Closing or (ii) 10 days before the reduction of the Additional Asset Value (as hereinafter defined) to zero, the Assuming Bank may at its option and within the earliest of 30 days after such payment, 180 days after the Bank Closing, or the date on which the Additional Asset Value is reduced to zero reassign (without recourse or warranty) to the Receiver the relevant account party obligation and any collateral securing same, whereupon the Assuming Bank shall, within 30 days following such reassignment but not later than 180 days after the Bank Closing or the earlier reduction of the Additional Asset Value to zero, select or purchase Available Assets (as hereinafter defined) with a value or purchase price equal to the amount of such payment less any recovery realized on the account party obligation prior to its reassignment to the Receiver, without any reduction as a result of such selection or purchase in the Additional Asset Value. In the event of payment by the Assuming Bank to the beneficiary under any such letter of credit after the earlier of (i) 169 days after the Bank Closing or (ii) 11 days before the Additional Asset Value is reduced to zero, the Assuming Bank shall use its best efforts (but not including any obligation to institute any legal action) to reimburse itself for such payment from the relevant account party or out of any collateral securing such account party's obligation. To the extent not made whole for such payment within 30 days after such payment, the Assuming Bank may thereupon reassign (without recourse or warranty) to the Receiver the remaining account party obligation and collateral, if any, securing same whereupon the Receiver shall pay in cash to the Assuming Bank the amount of such payment less any reimbursement received from the account party or out of collateral by the Assuming Bank. For purposes of this subsection 2.3, and subsection 3.3 hereof, the words "payment to the beneficiary" mean payment in cash, acceptance of a draft or any other method by which the Assuming Bank's obligation is discharged or evidenced by an instrument separate from the relevant letter of credit. If any recovery by the Assuming Bank is rescinded or otherwise restored upon the bankruptcy or insolvency of the account party or any party granting the collateral or otherwise, the Receiver shall forthwith pay to the Assuming Bank, in cash, the amount of such recovery which is rescinded or which must be so restored against assignment to the Receiver of the

relevant obligation or claim, if any. The amount of any payment in any currency other than that of the United States shall, for the purposes of this subsection 2.3, be an amount expressed in United States dollars determined at the asked exchange rate for spot transactions quoted in the New York interbank market by the Foreign Currency Appraiser on the date of such payment or, in the absence of such a quote, at the fair market asked exchange rate for spot transactions as of such date as agreed upon by the parties.

(b) *Letter of Credit Fees.*

Fees, whether paid prior to or after the Bank Closing for the issuance or confirmation of letters of credit assumed by the Assuming Bank, shall be one half for the account of the Receiver and one half for the account of the Assuming Bank, but the Assuming Bank's portion thereof shall be refunded pro rata to the Receiver in respect of any reassignment of an account party obligation or any portion thereof hereunder at the time of such reassignment. Adjustments for such fees shall be made on the first business day of each month, and the net amount due to the Receiver or to the Assuming Bank shall be paid in cash.

(c) *Adjustments to Schedule G.*

Notwithstanding any other provision of this Agreement, for a period of two years following the Bank Closing, Schedule G (and the list of letter of credit liabilities to be assumed referred to in this subsection 2.3) may be adjusted from time to time to add additional liabilities for letters of credit issued or confirmed by the Bank prior to the Bank Closing which are not standby letters of credit as that term is defined in the Ruling but not to delete therefrom, without the consent of the Assuming Bank, any letter of credit originally listed or included.

2.4 *Certain Tax Liabilities.*

The Assuming Bank expressly assumes and undertakes to pay, fulfill and discharge the liabilities of the Bank (whether or not shown on the books of the Bank) for taxes imposed by the United Kingdom or any municipality thereof resulting from operation of the Bank's London branch.

2.5 *Interest.*

All liabilities assumed under this Agreement by the Assuming Bank are assumed as of the Bank Closing, and the Assuming Bank agrees, subject to the provisions of subsection 2.6 hereof, to pay interest on the obligations assumed by the Assuming Bank in accordance with the terms of such obligations, as such terms are reflected on the records of the Bank at the Bank Closing.

2.6 *Payment of Taxes and Expenses.*

With respect to employee withheld payroll deductions and accrued real estate, sales and use, social security and unemployment taxes, taxes withheld or collected from customers, other tax liabilities and liabilities assumed by the Assuming Bank which relate to the Bank's fringe benefit plans, the Assuming Bank's responsibility is limited to payment, at the instruction of the Receiver, of the amounts of the liabilities assumed without any obligation to file any returns or make any reports or determine the correct amount of, or to assume liability for interest on, such payroll deductions, taxes and liabilities. With respect to accounts payable and accrued operating expenses, the Assuming Bank's responsibility is limited to payment, at the instruction of the Receiver, of the amount of any claim which is determined by the Receiver to be properly attributable to the period prior to the Bank Closing.

SECTION 3. DETAILED DESCRIPTION OF PURCHASE AND SALE AND DETERMINATION AND VALUATION OF ASSETS.

3.1 *Freedom from Certain Liens.*

The assets acquired by the Assuming Bank are being transferred free and clear of the FRB Security Interest which shall terminate and be of no further force and effect without further act or deed (i) immediately, in the case of assets referred to in subsection 3.2 hereof, (ii) effective upon selection, in the case of assets selected as provided in subsections 2.3, 3.3, 3.6 and 20.2 hereof and (iii) effective upon purchase or other transfer in the case of assets purchased or otherwise transferred as provided in Section 4 hereof.

3.2 *Conveyance of Entire Interest in Certain Assets.*

The Assuming Bank hereby purchases from the Receiver, and the Receiver hereby grants, sells, assigns, transfers, conveys and delivers

to the Assuming Bank, the entire interest of the Bank and the Receiver in and to the assets described in this subsection 3.2. Such assets are being purchased as of the Bank Closing at their Book Value unless otherwise specified below, subject to the adjustments set forth in this Agreement. All assets so purchased shall continue to accrue for the account of the Assuming Bank in accordance with the terms of the related obligation and shall be valued less any set-offs asserted by the obligor (direct or contingent) in respect of any such asset for liabilities of the Bank not assumed pursuant to Section 2 hereof.

(a) *Cash and Receivables from Banks.*

(i) United States currency and coin.

(ii) Foreign currency and coin.

(iii) Receivables (including certificates of deposit) properly classified in Schedule D of Reports of Condition of National Banking Associations under the captions "Demand Balances with Banks in the United States" and "Other Balances with Banks in the United States (including all balances with American branches of foreign banks)" which are due from other domestic banks and domestic branches (but not domestic agencies or representative offices) of foreign banks, receivables due from foreign branches of other American banks, federal funds sold, reserve accounts held by the FRB and cash items in process of collection (subject to return adjustments).

(iv) Food stamps.

(v) Advanced dividends—personal trust.

(b) *Consumer Installment Loans.*

Personal installment, check credit and other consumer loans (excluding dealer wholesale loans, dealer originated paper, receivables acquired by the Bank under its arrangements with Military Purchase Systems, Inc. and Small Business Administration loans) and credit card receivables and loans, including charged-off loans and receivables of such types, at Book Value (which shall be zero for such charged-off loans and receivables and any other loans and receivables of such types which should have been charged-off at or prior to the Bank Closing under the Bank's normal charge-off procedures) plus accrued interest

or adjusted for unearned discount (whichever is applicable and whether or not booked) and less unearned premiums on credit life insurance.

(c) *Other "Cash" and "Near-Cash" Items.*

All other receivables of the Bank properly classified in Schedule D of Reports of Condition of National Banking Associations under the caption "Balances with Banks in Foreign Countries (including balances with foreign branches of other American banks)" which are due from foreign banks, including demand and time deposits, placements and other similar assets, and receivables due from domestic agencies or representative offices of foreign banks, unless any of the foregoing are excluded in whole or in part by written statement to such effect (whereupon a conforming adjustment shall be made to Schedule C) delivered by the Assuming Bank to the Receiver within two banking business days after the Receiver delivers to the Assuming Bank a list of all such receivables reflecting the amounts by currency, interest rates and maturities thereof and the names of the foreign banks. Any such assets so excluded shall remain the property of the Receiver.

(d) *Pre-selected Assets.*

All assets listed by the Assuming Bank on Schedule F. Initially, and until the value of such assets is determined, such assets shall be valued at Book Value. Thereafter, the values of such assets shall be adjusted to values determined in the same manner as the value of similar assets is determined pursuant to subsection 3.3 or Section 4 hereof.

(e) *Accrued Assets and Prepaid Expenses.*

All accrued assets and prepaid expenses relating to an asset purchased under this subsection 3.2 or a liability assumed under Section 2 hereof, other than (i) expense advances to employees retained by the Assuming Bank for less than 5 days following the Bank Closing and (ii) such assets and expenses otherwise acquired hereunder.

(f) *Borrowed Securities.*

All borrowed securities for which the Assuming Bank has assumed the corresponding liability under subsection 2.1(c) hereof.

3.3 *Conveyance of Undivided Interest in Certain Assets.*

The Assuming Bank hereby purchases from the Receiver, and the Receiver hereby grants, sells, assigns, transfers, conveys and delivers to the Assuming Bank, an undivided interest in and to all assets of the Bank and the Receiver, which are described in this subsection and which are, at the time, available for purchase or selection (the "Additional Assets"). The Assuming Bank's undivided interest in the Additional Assets from time to time shall be an amount (the "Additional Asset Value") equal to the Book Value of the liabilities assumed by the Assuming Bank under subsection 2.1 hereof less the sum of (i) the premium provided for in Section 19 hereof, (ii) the value, as established under this Agreement, of the assets purchased by the Assuming Bank under subsection 3.2 hereof, (iii) the value, as established under this Agreement, of the Additional Assets theretofore selected under this subsection 3.3 and (iv) the purchase price, as established under this Agreement, of the assets theretofore purchased by the Assuming Bank under Section 4 hereof. During the period of 180 days following the Bank Closing, the Assuming Bank shall select Additional Assets as described in this subsection 3.3 and shall purchase assets described in Section 4 hereof, in each case by notice to the Receiver, which have an aggregate value and purchase price as established under this Agreement equal to the Additional Asset Value as of the Bank Closing (adjusted in accordance with the provisions of this Agreement, including without limitation Section 20 hereof) plus the amount of any payments to beneficiaries under letters of credit or advances by virtue of which the Assuming Bank is entitled to select Available Assets (as defined below) under subsection 2.3 or 3.6(g) hereof. Such selections and purchases shall be made within the times, at the valuations and subject to the adjustments provided for in this Agreement. Upon the selection or purchase of Additional Assets, the entire right, title and interest in and to such Additional Assets shall belong to and vest in the Assuming Bank as of the Bank Closing, without further act or deed. The Assuming Bank shall also be obligated to designate, as provided in subsection 3.4 hereof, those Additional Assets and assets described in Section 4 hereof as available for purchase which it determines not to select or purchase; and, in the case of Additional Assets, upon such designation the undivided interest of the Assuming Bank granted in such Additional Assets pursuant to this subsection 3.3 shall terminate

and the entire right, title and interest in and to such assets shall belong to and vest in the Receiver as of the Bank Closing without further act or deed. The assets so selected, purchased or designated shall thereupon no longer be a part of the Additional Assets. All Additional Assets shall continue to accrue in accordance with the terms of the related obligation and all such accruals shall be for the account of the Assuming Bank if the asset is selected or purchased, and for the account of the Receiver if the asset is so designated.

As used in this Agreement, the term "Available Assets" shall mean the Additional Assets and the assets available at the time for purchase pursuant to Section 4 hereof.

(a) *Securities.*

(i) The Assuming Bank may select, in the manner provided for in this subsection 3.3(a), securities owned by the Bank as of the Bank Closing (except stock of the FRB, stock of FNB Bradford Stock Services, Inc., stock of the Bank's subsidiaries and warrants, options or similar rights received or bargained for by the Bank at the time of the initial making of a loan by the Bank) including, but not limited to, securities issued by the United States Treasury, by United States Government agencies or corporations, by a state or political subdivision or by a private corporation or other business entity. Such securities may be selected or rejected before or after valuation but in each case shall be valued at their fair market value as determined below, plus accrued but unpaid interest as of the Bank Closing. Such interest computation will be made by the Assuming Bank and the Receiver. Securities not selected or rejected prior to valuation may be selected within two banking business days after the date their fair market value, as determined pursuant to subsection 3.3(a)(ii) hereof, has been furnished by the Securities Appraisers (as hereinafter defined) to the Assuming Bank. Securities appraised and not selected within such period shall be deemed automatically rejected by the Assuming Bank. Securities so selected which were pledged by the Bank as security for public deposits, pledged as security for a bond issued to secure public deposits, pledged for faithful performance of the trust department of the Bank or sold by the Bank subject to repurchase agreements may, but need not, be selected and, if selected, shall be selected subject to any such pledge or security interest. Any other securities so selected but

not delivered to the Assuming Bank within three banking business days after selection may be rejected by the Assuming Bank at any time prior to delivery. Within three banking business days after any securities are rejected or deemed rejected by the Assuming Bank, the Assuming Bank shall take whatever steps are necessary to obtain the release of any security interests which exist in the rejected securities and which secure liabilities assumed by the Assuming Bank and shall provide the Receiver with such documents or other evidence of that release as it shall reasonably request.

(ii) From time to time and as promptly as practicable (but in any event within 150 days) after the Bank Closing, the fair market value as of the Bank Closing (or later date referred to below) of all securities available for selection hereunder and not previously rejected by the Assuming Bank shall be determined by Salomon Brothers and Merrill Lynch, Pierce, Fenner & Smith Incorporated (the "Securities Appraisers") in the manner referred to in Annex 1 hereto. The Securities Appraisers shall furnish such determinations of fair market value in writing to the Assuming Bank and the Receiver immediately upon the making of such determinations. In the event that the determination of fair market value is not made with respect to any security owned by the Bank as of the Bank Closing within fifteen days of the Bank Closing, the Receiver or the Assuming Bank may request, prior to selection, a new determination of the fair market value of such security as of two banking business days following such request, and such security shall be valued and may be selected by the Assuming Bank at the higher of the two valuations.

(b) *Loans.*

(i) The Assuming Bank may select loans made by the Bank including customers' liabilities on acceptances and overdrafts. The loans so selected shall be valued at their Book Value plus accrued but unpaid interest or less unearned discount, whichever is applicable, as of the Bank Closing. Any loans purchased by the Assuming Bank pursuant to subsection 3.2(b) hereof or selected pursuant to this subsection 3.3(b) which are subject to the interest of Bank of America National Trust and Savings Association under

its participation agreement with the Bank shall be purchased or selected subject to such interest, and the Assuming Bank shall not fail to select any such loan if such failure would result in a liability to the Receiver pursuant to such participation agreement.

(ii) The Assuming Bank agrees to select receivables arising from advances made with respect to selected mortgage loans such as real estate tax, insurance and other advances, at the Book Value thereof.

(iii) Warrants, options or similar rights received or bargained for by the Bank at the time of the initial making of a loan by the Bank shall be acquired by the Assuming Bank without any reduction in the Additional Asset Value if the loan is selected. Such warrants, options or similar rights shall become the sole property of the Receiver if the loan is rejected.

(iv) Any overdraft on which full payment is made within 30 days of the Bank Closing shall be automatically selected by the Assuming Bank. Any other overdraft may be selected or rejected, except that the Assuming Bank may only reject that part of any overdraft that it cannot satisfy by exercising any rights of set-off available to it and shall thereafter remit to the Receiver any collections on the overdraft received by it.

(v) Any foreign exchange contracts entered into by the Bank to specifically cover the exchange risk on a foreign currency loan shall be acquired by the Assuming Bank without any reduction in the Additional Asset Value if that foreign currency loan is selected. Such contracts shall become the sole property of the Receiver if that foreign currency loan is rejected.

(c) *Accrued Assets and Prepaid Expenses.*

The Assuming Bank shall purchase all accrued assets and prepaid expenses relating to an asset selected under this subsection 3.3 at Book Value other than expense advances to employees retained by the Assuming Bank for less than five days following the Bank Closing.

3.4 *Procedure for Additional Asset Selection.*

(a) On or before each of the dates specified below, the Assuming Bank shall have purchased pursuant to subsection 3.2(d) or 3.3 or pursuant to Section 4 hereof, by notice to the Receiver or by inclusion

in Schedule F, assets having an aggregate value and purchase price, determined as provided in this Agreement, equal to or, for any period prior to the last such period, greater than the product of (i) the sum of the Additional Asset Value as of the Bank Closing and the value and purchase price of the assets purchased pursuant to subsection 3.2(d) hereof multiplied by (ii) the percentage set forth opposite such date in the table below:

Date Following The Bank Closing	Percentage
30th day	20%
60th day	50%
90th day	70%
120th day	80%
150th day	90%
180th day	100%

provided however that, solely for this purpose, no purchase of securities listed on Schedule F or selected pursuant to subsection 3.3(a) within 25 days after the Bank Closing shall be taken into account and the value of any securities so purchased shall be deducted from the Additional Asset Value as of the Bank Closing.

(b) On or before each of the dates specified below, the Assuming Bank shall have rejected Available Assets, and assets listed on Schedule E, by notice to the Receiver or inclusion in Schedule E, having an aggregate Book Value of not less than:

(i) in the case of the following dates, the amount set forth opposite such date in the following table (excluding, for the purpose of this subdivision (i), the value of securities rejected or deemed rejected pursuant to subsection 3.3(a) or by being listed on Schedule E):

Date Following The Bank Closing	Book Value of Assets to be Rejected by Such Date
30th day	$100,000,000
60th day	300,000,000
90th day	500,000,000

and (ii) in the case of the following dates, an aggregate of:

(A) $500,000,000, plus

(B) the difference between the Book Value of the Available Assets required to be rejected under this Agreement and $500,000,000 multiplied by the percentage set forth opposite such date in the table below:

Date Following The Bank Closing	Percentage
120th day	30%
150th day	60%
180th day	100%

(c) Assets listed on Schedule E or F shall, for the purpose of the foregoing computations, be deemed to have been rejected or purchased, respectively, as of the Bank Closing. The computations involved in determining the amounts of assets required to be rejected shall be based on Book Value whether or not the assets have been appraised.

(d) Asset selections may be made at any time, but, except as otherwise provided in this Agreement, rejections may be made no more frequently than once each week.

(e) In the event that, by the end of any period specified above, the Assuming Bank does not, by notice, select or purchase the percentage of Additional Asset Value required or does not, by notice, advise the Receiver that it has rejected the required amount of Available Assets, the Receiver, upon such consultation with and notice to the Assuming Bank as it deems reasonable, may designate the Available Assets which are deemed selected, purchased and rejected during the period. The parties recognize that the Additional Asset Value as of the Bank Closing will be adjusted from time to time as provided in this Agreement and that the requirements of this subsection 3.4 accordingly will be based upon the best information available at a reasonable time prior to the time such requirements are to be met. Selections, purchases and rejections shall be final and irrevocable, whether made by the Assuming Bank or by the Receiver, except as otherwise provided in this Agreement.

(f) Notwithstanding any other provision of this Agreement, in the event the Assuming Bank rejects a loan which has been expressly secured by a time or demand deposit of the Bank which has been assumed by the Assuming Bank pursuant to subsection 2.1 hereof, the

Assuming Bank shall hold such deposit subject to such security interest and shall not pay such deposit except under the terms of any security agreement (unless the loan is in default) or with the approval of Receiver or as may be required by law. When a loan secured otherwise than as set forth above is rejected, the Assuming Bank shall deliver (without recourse or warranty) to the Receiver at the time of rejection all collateral (or evidences thereof) securing the loan then or thereafter in the possession of the Assuming Bank.

(g) Whenever the Additional Asset Value is reduced to zero, and, in any event, 180 days after the Bank Closing, all remaining Available Assets shall be deemed rejected.

3.5 *Extensions and Modifications of Loans.*

During the period of 180 days after the Bank Closing, the Assuming Bank may, without prior approval of the Receiver and without prejudice to the Assuming Bank's right to reject a particular loan, (i) extend the maturity of or postpone any payment of principal or interest on the loan for up to 90 days, (ii) increase the rate of interest on the loan or, if in accordance with the contract, reduce the rate of interest on the loan or (iii) modify any other terms of the loan provided the repayment schedule is not modified otherwise than as permitted by clause (i) of this subsection, collateral is not released without substitution of comparable collateral of equal or greater value, payment of interest or principal is not waived or subordinated and any other person who is obligated on such loan is not released; the substitution of new accounts receivable in accordance with the terms of an agreement with a customer of the Bank in existence at the Bank Closing for cash received in payment of accounts receivable previously assigned to the Bank or the Assuming Bank shall be deemed to satisfy the requirements of the foregoing clause (iii). Any such extensions or modifications are to be in accordance with prudent banking practice (taking into account the information reasonably available to the Assuming Bank when the decision to extend or modify is made).

3.6 *Advances by the Assuming Bank.*

Advances to a customer of the Bank who was indebted on a loan (including indebtedness drawn down as part of a line of credit) which is

a part of the Additional Assets (an "Outstanding Loan") may be made by the Assuming Bank under the following circumstances and with the following results:

(a) Where the Assuming Bank has an existing loan relationship (including that of syndicate manager but excluding an interest in a syndicated loan for which some other bank is the syndicate manager) with a customer of the Bank, advances on an Outstanding Loan to that customer may be made by the Assuming Bank without consultation with or prior approval of the Receiver, but any advances so made shall be solely for the account of the Assuming Bank. If the Outstanding Loan is rejected by the Assuming Bank, it shall have a participation interest in the Outstanding Loan and such advances as provided in paragraph (i) of this subsection 3.6.

(b) Where a bank other than the Assuming Bank is the manager of a syndicated Outstanding Loan in which both the Bank and the Assuming Bank have an interest, advances in accordance with the syndicate or participation agreement may be made by the Assuming Bank during the 60 days after the Bank Closing as a result of the Bank's interest without consultation with or prior approval of the Receiver, so long as the Assuming Bank makes a similar advance pursuant to such agreement for its own account. Advances on account of the Assuming Bank's interest shall be solely for its account. Advances on account of the Bank's interest shall be solely for the account of the Assuming Bank if it selects such Loan or participation from the Additional Assets; but if such Loan or participation is rejected, such advances shall be for the Receiver's account.

(c) In the case of an Outstanding Loan which is a construction loan, and where, under normal banking practices, there is considered to be a take-out commitment (and such commitment is in writing) other than from the Bank or an affiliate of the Bank known to be such by the Assuming Bank, the Assuming Bank may make additional advances on the Outstanding Loan during the 180 days after the Bank Closing in accordance with certification and other take-down requirements of the existing Outstanding Loan documents, where the conditions for such additional advances have been met in accordance with normal banking practices, without consul-

tation with or prior approval of the Receiver. If the Outstanding Loan is selected by the Assuming Bank from the Additional Assets, the advances shall be for the account of the Assuming Bank; but if the Outstanding Loan is rejected, such advances shall be for the Receiver's account.

(d) Additional advances on Outstanding Loans which do not fall within paragraphs (a), (b) or (c) of this subsection 3.6 may be made by the Assuming Bank during the 30 days after the Bank Closing without consultation with or prior approval of the Receiver so long as the aggregate unpaid principal amount of all advances made under this paragraph (d) does not exceed $25,000,000 at any time during such 30-day period. If the Outstanding Loan is selected by the Assuming Bank from the Additional Assets, the advances shall be for the account of the Assuming Bank; but if the Outstanding Loan is rejected, such advances shall be for the Receiver's account.

(e) Additional advances with respect to Outstanding Loans not falling within paragraphs (a), (b), (c) or (d) of this subsection 3.6 may be made with or without prior approval of the Receiver. If such prior approval is obtained, the Assuming Bank may either select or reject the Outstanding Loan. If such Loan is selected, the advance shall be for the account of the Assuming Bank. If such Loan is rejected, the advance will be paid for in cash by the Receiver. If such prior approval is not obtained and the Outstanding Loan is selected by the Assuming Bank, it shall select the entire amount of the Outstanding Loan computed at the Bank Closing and all advances made thereon shall be for the account of the Assuming Bank. If such prior approval is not obtained and the Outstanding Loan is rejected by the Assuming Bank, it shall have a participation interest in the Outstanding Loan and such advances as provided in paragraph (i) of this subsection 3.6.

(f) Notwithstanding paragraphs (a), (b), (c), (d) and (e) of this subsection 3.6, without the Receiver's prior approval no advance shall be made except for the account of the Assuming Bank (i) with respect to Outstanding Loans classified as Substandard, Doubtful or Loss in the August 1974 examination of the Bank by the Comptroller of the Currency or (ii) if the Receiver notifies the Assuming Bank prior to the advance not to make any further

advances with respect to that customer. If such prior approval for an advance is not obtained and the Outstanding Loan is selected by the Assuming Bank, the advance shall be for the account of the Assuming Bank. The Outstanding Loan may be rejected by the Assuming Bank, but it shall have a participation interest in the Outstanding Loan and such advances as provided in paragraph (i) of this subsection 3.6.

(g) Upon the rejection of an Outstanding Loan on which the Assuming Bank has made advances which prove to be for the account of the Receiver and which are not to be paid for in cash pursuant to subsection 3.6(e) hereof, the Assuming Bank shall, within the succeeding 30 days, select and purchase, in the manner provided in Section 3 or 4 hereof, Available Assets of a value and purchase price equal to the amount of such advances without any reduction as a result of such selection and purchase in the Additional Asset Value.

(h) Within fifteen days of the making of any advance with respect to an Outstanding Loan, the Assuming Bank shall deliver to the Receiver a statement setting forth the advances made, to whom they were made, information as to the existence or nonexistence of a borrowing relationship with the Assuming Bank and other information sufficient to enable the Receiver to determine the applicability of particular provisions of this subsection 3.6.

(i) In the event the Assuming Bank makes one or more advances on an Outstanding Loan, rejects such Outstanding Loan and is to have a participation interest in such Outstanding Loan and such advances, pursuant to subsection 3.6(a), (e) or (f) hereof (hereinafter called the "Advances" and the principal amount of the Outstanding Loan plus the principal amount of all Advances theretofore made less the amount of all payments and collections theretofore received and applied to principal being called the "Debt"), any payments or collections on the Debt received subsequent to the making of the first Advance shall, upon such rejection, be applied for the account of the Assuming Bank to the extent the Assuming Bank would have been entitled to participate in such payment or collection had it acquired through the making and at the time of each Advance a pari passu participation interest in the Debt in the same ratio as the unpaid principal amount of such

Advance bears to the then Debt. Following such rejection and after such application, the Assuming Bank shall have a pari passu participation interest in the Debt in the ratio which the outstanding principal amount of all such Advances bears to the then outstanding Debt. All payments or collections on such Debt, whether received before or after rejection, shall be applied pro rata, first, to accrued interest and, second, to unpaid principal.

3.7 *Servicing Arrangements.*

(a) The Assuming Bank agrees to service all Additional Assets (but only until such assets are either selected or rejected by the Assuming Bank) in accordance with normal and prudent banking practices, but subject to the other provisions of this Agreement and giving due recognition to the Assuming Bank's lack of familiarity with the Additional Assets. The Assuming Bank shall exercise reasonable diligence with respect to collections. The Receiver will pay the Assuming Bank $200,000 at the end of every 30 days during the 180 day period following the Bank Closing, as a fee for the servicing of those Additional Assets.

(b) During the 180-day period following the Bank Closing, the Assuming Bank shall hold (on a non-segregated basis) for the benefit of itself and the Receiver all principal, interest, dividends, premiums, rental income from the Real Estate (as hereinafter defined) and other payments, income or distributions on the Available Assets. Any such amounts received with respect to assets selected by the Assuming Bank shall be for its account; and, subject to the provisions of subsection 3.6(i) hereof, any such amounts received with respect to assets rejected by the Assuming Bank shall be for the account of the Receiver and shall be paid to the Receiver at the time such assets are rejected by the Assuming Bank, together with interest computed at the Assuming Bank's prime rate from the date of receipt by the Assuming Bank to the date of payment by the Assuming Bank to the Receiver.

(c) The Assuming Bank agrees that after the Bank Closing it will, if requested, act as agent for the Receiver at locations where the Assuming Bank has an office to hold for safekeeping assets of the Receiver located outside the United States and to receive and remit to the Receiver, in accordance with the Receiver's instructions, any payments of principal, interest or otherwise made on such assets which

are paid or payable at locations outside of the United States. The Assuming Bank's obligation shall be limited to the safekeeping of such assets and to receive and remit such payments and it shall have no obligation to take any action to enforce any obligation owed the Receiver on any such asset. The Assuming Bank shall be reimbursed by the Receiver for reasonable out-of-pocket expenses incurred in carrying out its obligations under this subsection 3.7(c).

3.8 *Right of First Refusal.*

Other than assets to be sold in an established securities or currency trading market or at an auction, the Assuming Bank shall have the right of first refusal on all assets rejected by the Assuming Bank and thereafter offered for sale by the Receiver on terms no less favorable to the purchaser than those offered by an unrelated third party. Such right of first refusal shall be limited, however, to any asset or group of assets which are offered for sale by the Receiver at a price in excess of $100,000 within the period of one year following the Bank Closing, and such right must be exercised by delivery of notice to the Receiver within two banking business days following notice from the Receiver that it intends to sell the assets or group of assets and the terms of the proposed sale. The Assuming Bank shall also have the right at any time to purchase, for cash, loans held by the Receiver at their then book value plus accrued interest or less unearned discount, as the case may be.

SECTION 4. PURCHASE AND SALE OF OTHER ASSETS; ASSIGNMENTS OF AND SUBLEASES UNDER LEASES.

4.1 *General.*

(a) The Receiver hereby grants to the Assuming Bank an option to purchase the entire interest of the Bank and the Receiver and any subsidiary of the Bank in and to any or all of the assets (other than leases) of the Bank and its subsidiaries described in this Section 4 as available for purchase, for the purchase price arrived at as set forth below with respect to each asset and within the time limitations specified in this Section 4. Upon the purchase by the Assuming Bank of any such asset, the Additional Asset Value shall be reduced by an amount equivalent to the purchase price with respect to the purchased

asset, subject to the adjustments set forth in this Agreement. If an asset is purchased prior to an appraisal required by this Section 4, the amount of such reduction shall initially be the Book Value of such asset (less the amount of any outstanding indebtedness for borrowed or purchase money secured by any mortgages or other liens to which such asset may be subject) and shall thereafter be adjusted for the difference between the Book Value and the fair market value of such asset. The Assuming Bank may terminate such option as to any such asset at any time, whereupon such asset shall, for the purposes of this Agreement, be deemed rejected and no longer a part of the Available Assets. The Receiver shall hold available for such purchase each such asset until, and the option herein granted shall terminate upon, the earlier of (i) 180 days after the Bank Closing, (ii) the date on which such asset has been rejected by the Assuming Bank or (iii) the date upon which the Additional Asset Value shall become zero.

(b) The Receiver hereby grants to the Assuming Bank an option in accordance with this Section 4 to receive an assignment of or sublease under any lease to the Bank or Franklin Buildings, Inc. ("FBI") other than any lease of property owned by FBI, to the extent consistent with the provisions of the particular lease and the rights of the parties thereto.

4.2 *Real Property.*

(a) The Assuming Bank may, by notice to the Receiver, exercise its option to purchase the fee of any parcel of real property, including all improvements and fixtures thereon, owned by the Bank or by FBI at the Bank Closing (the "Real Estate"). The purchase price of each parcel of the Real Estate shall be its fair market value at the Bank Closing as determined pursuant to subsection 4.2(b) hereof (less the amount of any outstanding indebtedness for borrowed or purchase money secured by any mortgages or other liens to which such parcel may be subject). In no event shall any parcel of the Real Estate have a purchase price of less than zero.

(b) Within 150 days after the Bank Closing, the Receiver shall, as to each parcel of the Real Estate, unless such parcel was previously rejected by the Assuming Bank pursuant to subsection 3.4 hereof, cause the title of such parcel to be examined by a title company or companies to be designated by agreement between the Receiver and the Assuming

Bank (the "Title Company") and cause such parcel to be appraised by James D. Landauer Associates, Inc. (the "Property Appraiser") to determine its fair market value as of the Bank Closing. The fair market value of each such parcel shall be determined on the assumption that such parcel is sold as an asset in an all cash sale between a willing seller and purchaser for the same use as such parcel was being used by the Bank at the Bank Closing without regard to any business associated therewith, it being intended that goodwill not be a factor in such appraisal; however, such appraisal shall take into account all encumbrances affecting the parcel or the title thereto, but without taking into consideration any mortgage or other lien securing any outstanding indebtedness for borrowed or purchase money or any of the present leases to the Bank of the Real Estate owned by FBI. If any such parcel has space which at the Bank Closing was not used by the Bank in the branch operations of any branch of the Bank and such space is not currently occupied by a tenant or subtenant, the Property Appraiser shall also take into account the cost which an owner of such parcel might reasonably incur in preparing such space for use by a prospective tenant or subtenant thereof.

(c) If the Assuming Bank exercises its option to purchase any parcel of the Real Estate, the Receiver shall convey or cause to be conveyed title thereto by bargain and sale deed without covenants to the Assuming Bank as soon thereafter as practicable. The title to be conveyed will be such title as the Title Company shall have certified in its title report prepared pursuant to subsection 4.2(b) hereof, subject to the title exceptions therein set forth, except that prior to the conveyance of title of any parcel of the Real Estate owned by FBI, the Receiver agrees to (i) have such parcel released from the lien of certain mortgages and supplemental mortgages to Bankers Trust Company, as trustee, which the parties understand presently secure an indebtedness of FBI of approximately $21,000,000, (ii) cancel any lease (such cancellation, however, to be subject to the rights of subtenants, if any) of such parcel by FBI to the Bank, (iii) have such parcel released from the lien or other encumbrance of any other security instruments, if any, pertaining to the indebtedness referred to in clause (i) above, (iv) take such action as may be required in order that the Assuming Bank shall have no obligations with respect to such mortgages or security instruments, the obligations secured thereby or such leases (except as to sub-

tenants, if any, under such leases, as provided in subsection 4.5 hereof) and (v) cause all title exceptions relating to clauses (i) and (ii) above or to the security instruments referred to in clause (iii) above to be deleted from said title report. The Receiver agrees at the request of the Assuming Bank to use its reasonable best efforts (other than the payment of any money) to cause the removal of all other liens, burdens or encumbrances to which the title may be subject. If title is conveyed to the Assuming Bank subject to any mortgages or other liens securing any outstanding indebtedness for borrowed or purchase money, the Assuming Bank shall assume the same unless such indebtedness was without recourse to the Bank.

(d) The Receiver shall bear the costs of conveyance usually and customarily borne by the seller of real property in the place in which the property is situated except those from which the Receiver may be exempt; provided, however, the Receiver shall pay real property transfer taxes to the extent that the Receiver's exemption therefrom imposes an additional tax burden on the Assuming Bank. The Assuming Bank shall bear that portion of the costs of such conveyance usually and customarily borne by the purchaser of real property in the place in which the property is situated. Closing adjustments shall be as of the Bank Closing and, unless otherwise provided in this Agreement (it being understood that neither the Receiver nor the Assuming Bank shall be required to bear any cost or expense more than once), shall be in accordance with the Customs in Respect to Title Closings as published by the Real Estate Board of New York, Inc.

4.3 *Leasehold Interests.*

(a) The Assuming Bank may, by notice to the Receiver, exercise its option to obtain an assignment of any lease (other than a lease of any parcel of the Real Estate and/or personal property owned by FBI in effect at the Bank Closing) to the Bank or FBI covering real and/or personal property in effect at the Bank Closing or a sublease under any such lease of all of the property subject to such lease for the balance of the term thereof and, to the extent requested by the Assuming Bank, any renewal terms which can be exercised (less, in the case of a sublease, such period of time as is necessary for the sublease to be a sublease and not an assignment), and on the same terms, including the amount of rent, provided in such lease, to the extent consistent with the

provisions of such lease and the rights of the parties thereto. The Assuming Bank's option shall terminate if the Assuming Bank gives notice to the Receiver that it does not intend to exercise its option or if the option is not exercised within 120 days after the Bank Closing except that as to such leases as the Receiver shall designate by notice prior to the expiration of said 120 day period the option shall continue until terminated by 10 days notice by the Receiver to the Assuming Bank. The Assuming Bank agrees to exercise its option under this subsection 4.3(a) or to give notice that it does not intend to exercise such option as promptly as feasible after the Bank Closing.

(b) Upon the exercise by the Assuming Bank of its option as to any lease, the Receiver shall execute and deliver to the Assuming Bank an appropriate assignment of or sublease under such lease, and the Assuming Bank shall assume all obligations of the Bank and the Receiver under such lease as of the Bank Closing. In the case of any lease as to which the option has terminated, the Receiver shall use its best efforts (but shall not be obligated to assume the obligations of the Bank under such lease) to enable the Assuming Bank to have access to the leased premises for a reasonable period of time following the Bank Closing. No exercise of the option granted pursuant to subsection 4.1(b) hereof shall affect the Additional Asset Value or the obligation of the Assuming Bank to purchase assets under subsection 3.4 hereof.

(c) In the case of any lease as to which the Assuming Bank desires an assignment or sublease but as to which either there are terms and conditions which in the reasonable judgment of the Assuming Bank are onerous, the fair use value, determined pursuant to subsection 5.8 hereof, is less than the rental required by the lease or the holder of the lessor's interest has the right to refuse to consent to such assignment or sublease and has refused to consent thereto on reasonable conditions, the Receiver agrees to use its reasonable best efforts to cause the lessor to eliminate such onerous terms and conditions, to reduce such rental to an amount equal to the fair use value or to obtain the consent of the lessor to such assignment or sublease on reasonable conditions.

4.4 *Other Personal and Real Property.*

(a) The Assuming Bank may, by notice to the Receiver, exercise its option to purchase any furniture, trade fixtures or other tangible

personal property, including computer programs, which at the Bank Closing were owned by the Bank or by FBI (the "Personalty") or any leasehold improvements (other than in respect of the Real Estate owned by FBI, the leasehold improvements on which are being treated as improvements pursuant to subsection 4.2(a) hereof) installed at the expense of the Bank. Upon the purchase of any Real Estate pursuant to subsection 4.2 hereof or the taking of an assignment of or sublease under any lease pursuant to subsection 4.3 hereof or the execution of any new lease by the Assuming Bank of premises leased by the Bank at the Bank Closing, the Assuming Bank shall exercise its option to purchase all Personalty and, in the case of any lease, all leasehold improvements, installed at the expense of the Bank, in each case used by the Bank in the branch operations of its branch at such location.

(b) The purchase price of the Personalty and leasehold improvements purchased by the Assuming Bank pursuant to subsection 4.4(a) hereof shall be the fair market value thereof at the Bank Closing determined in accordance with subsection 4.4(d) hereof (less the amount of any outstanding indebtedness for borrowed or purchase money secured by mortgages, chattel mortgages, security interests or other liens affecting such Personalty or leasehold improvements, unless such indebtedness was applied in reduction of the fair market value of the Real Estate purchased pursuant to subsection 4.2 hereof). Notwithstanding the foregoing, computer programs included in the Personalty shall have a purchase price of zero. In no event shall any Personalty or leasehold improvements have a purchase price of less than zero; provided, however, that if any Personalty required by subsection 4.4(a) hereof to be purchased would otherwise have a purchase price of less than zero, the Assuming Bank may elect not to purchase such Personalty.

(c) If requested by the Assuming Bank, prior to the assignment of, or sublease to the Assuming Bank under, any lease pursuant to subsection 4.3(a) hereof or the execution of any new lease by the Assuming Bank of real property leased by the Bank, or as soon thereafter as is feasible, the Receiver shall cause the Title Company to issue a report of search showing claims or liens, if any, against the leasehold improvements other than interests of landlords under the lease or interests of subtenants under leases, if any. Such search and report shall be paid for by the Assuming Bank.

(d) Within 150 days after the Bank Closing, the Personalty and leasehold improvements installed at the expense of the Bank shall be

appraised by the Property Appraiser to determine fair market value at the Bank Closing, such fair market value to be determined on the assumption that the item of Personalty or such leasehold improvement is sold as an asset in an all cash sale between a willing seller and purchaser for the same use as such item or improvement was being used by the Bank at the Bank Closing without regard to any business associated therewith, it being intended that goodwill not be a factor in such appraisal, and that as to such leasehold improvements there shall also be taken into account the balance of the term of the respective lease and the length of the term under each option to extend the original term of or to renew such lease.

(e) The Assuming Bank may, by notice to the Receiver, exercise its option to purchase (i) all outstanding shares of any wholly owned subsidiary of the Bank (other than FBI) or purchase all of the assets and assume all of the liabilities of any such subsidiary at a purchase price equal to the fair market value of such stock determined by the Securities Appraisers, (ii) all right, title and interest of the Receiver and the Bank in any financing leases by the Bank or participations in any financing leases to others of personal property, including the interest of the Bank and the Receiver in such personal property, at a purchase price equal to the Book Value thereof, and (iii) any other tangible or intangible assets owned by the Bank (except stock of the FRB and FNB Bradford Stock Services, Inc.) not otherwise covered by this Agreement, at such purchase price as may be agreed upon by the Receiver and the Assuming Bank, except that if the Assuming Bank elects to purchase a part of the name of the Bank, its purchase price for purposes of this Agreement shall be zero.

(f) The Assuming Bank agrees that upon the purchase, assignment or sublease of any property pursuant to this Section 4, or upon the execution of any new lease by the Assuming Bank with respect to any property leased by the Bank, it shall purchase all prepaid expenses relating to such property, at a purchase price equal to the Book Value thereof.

(g) The Receiver shall execute and deliver or cause to be executed and delivered to the Assuming Bank appropriate bills of sale or other transfer instruments transferring to the Assuming Bank all the right, title and interest of the Receiver, the Bank or any subsidiary of the Bank in and to any property purchased by the Assuming Bank pursuant to this subsection 4.4.

4.5 *Leases and Subleases to Third Parties.*

If, on the effective date of the purchase, assignment or sublease of any property pursuant to this Section 4, such property is subject to a lease or sublease to a third party, the Assuming Bank shall accept such property subject to such lease or sublease to a third party of which lease or sublease the Assuming Bank has actual or constructive notice, and the Assuming Bank agrees to assume all obligations of the Bank and the Receiver with respect thereto. The Assuming Bank shall continue to be liable pursuant to subsection 2.1(h) hereof for any security deposits by such third parties; however, if the Assuming Bank does not exercise its option to purchase any such property or to receive an assignment of or sublease under the lease thereof or does not enter into a new lease with respect to such leased property, the Assuming Bank shall return to the Receiver an amount equal to the security deposits of all third parties relating to such property and the Assuming Bank's liability with respect to such security deposits pursuant to subsection 2.1(h) hereof shall be cancelled.

4.6 *Sales and Use Taxes.*

All sales or use taxes (but excluding any real property transfer taxes) which may be imposed on a transfer of any property to the Assuming Bank pursuant to this Section 4 shall be the obligation of the Assuming Bank.

4.7 *Receiver's Assistance.*

In the event the Assuming Bank requests any disposition of any of the property referred to in this Section 4 other than as provided for in this Section 4, the Receiver agrees to use its best efforts to cooperate with the Assuming Bank in accomplishing such requested disposition provided such request is reasonable in the Receiver's sole discretion and does not impair and is not inconsistent with the rights, duties and obligations of the Receiver.

4.8 *Right to Designate Grantee, Assignee or Sublessee.*

In each situation under this Section 4 in which the Assuming Bank is entitled to purchase any asset of the Bank or any subsidiary or to have an assignment of a lease to the Bank or to receive a sublease of any property held by the Bank under a lease, the Assuming Bank may

designate one or more persons, firms or corporations as the grantee of such asset, the assignee of such lease or the sublessee of such sublease, provided that the Assuming Bank shall, contemporaneously therewith, agree to guarantee to the Receiver the performance by such substitute grantee, assignee or sublessee of any obligation which the Assuming Bank would have been required to assume had it been the grantee, assignee or sublessee in the transaction.

SECTION 5. USE OF PROPERTY

5.1 *Operation of Banking Offices by Assuming Bank.*

Provided it is granted appropriate permission by the Comptroller of the Currency, the Federal Reserve Board, the Corporation and/or the applicable state supervisory agency, whichever has jurisdiction, the Assuming Bank will exert its best efforts (with the assistance of the Receiver and as to the use of any property solely as the licensee of the Receiver) to reopen, continue to operate and use for business, commencing on the first business day after the Bank Closing, all domestic banking offices and domestic banking branches used by the Bank at the Bank Closing and listed on Schedule H hereto. Any such office or branch may be closed and its use discontinued within 30 days after the Bank Closing only if the Corporation, with the advice of the appropriate bank supervisory agency or agencies, determines that such discontinuance will not adversely affect the convenience and needs of the public.

5.2 *Use of Owned Property by Assuming Bank.*

The Assuming Bank shall have the right to use, solely as the licensee of the Receiver, any property owned by the Bank or FBI, or any property owned by any other subsidiary of the Bank and used by the Bank in its banking business at the Bank Closing, for a period which shall commence at the Bank Closing and continue until the date of any purchase thereof or termination of the option with respect thereto pursuant to Section 4 hereof.

5.3 *Use of Leased Property by Assuming Bank.*

The Assuming Bank shall have the right to use, solely as the licensee of the Receiver, any property leased by the Bank (other than property owned by FBI) or by FBI, or any property leased by any other subsidiary of the Bank and used by the Bank in its banking

business at the Bank Closing, for a period which shall commence at the Bank Closing and continue until the date of any assignment of or sublease under the lease thereof or of the execution of any new lease thereof or termination of the option with respect thereto pursuant to Section 4 hereof.

5.4 *Maintenance.*

The Assuming Bank shall maintain all property which it uses pursuant to this Section 5 in as good condition as when received, reasonable wear and tear and damage by fire and other casualty excepted.

5.5 *Insurance.*

Until the later of (a) the date the Assuming Bank's use of any property, as licensee of the Receiver, pursuant to this Section 5 is discontinued or (b) the date of any purchase, assignment or sublease with respect to such property or of the execution of any new lease thereof or termination of the option with respect thereto pursuant to Section 4 hereof, the Assuming Bank shall carry insurance coverage, including public liability insurance, on all such property used by the Assuming Bank to the same extent as it or its bank affiliates do with respect to comparable property owned or used by the Assuming Bank, and all such insurance policies shall insure the Receiver, the Assuming Bank and all other interested parties as their interests may appear. In the event of any loss as to any such property (i) the Assuming Bank's right to purchase or obtain an assignment or sublease with respect to such property shall not be impaired; (ii) property to be purchased shall be valued as of the Bank Closing; (iii) if the Assuming Bank purchases or obtains an assignment, sublease or new lease with respect to such property, the insurance proceeds payable to the Receiver and to the Assuming Bank shall be paid to the Assuming Bank; and (iv) if the Assuming Bank does not purchase or obtain an assignment, sublease or new lease with respect to such property, the insurance proceeds payable to the Receiver and to the Assuming Bank shall be paid to the Receiver. As to property which the Assuming Bank has a right to purchase, the parties agree that Section 5-1311 of the General Obligations Law of the State of New York shall have no application in the event of loss or damage by fire or other casualty. The Assuming Bank agrees to give the Receiver not less than five business days advance notice of its intention to discontinue use of any property used by the Assuming Bank pursuant to this Section 5.

5.6 *License Fees, Expenses and Adjustments.*

(a) If the Assuming Bank uses, as the licensee of the Receiver, and purchases pursuant to Section 4 hereof any Real Estate, Personalty or leasehold improvements installed at the expense of the Bank, it shall not, except as set forth below, be required to pay any license fee to the Receiver for any use of such property prior to the date of its purchase. If the Assuming Bank's option to purchase terminates pursuant to Section 4 hereof as to any Real Estate, Personalty or leasehold improvements installed at the expense of the Bank which the Assuming Bank has used as the licensee of the Receiver, the Assuming Bank shall pay a license fee, in cash, to the Receiver equal to the fair use value, as determined pursuant to subsection 5.8 hereof, for its use of such property to the later of (i) the date such use is discontinued or (ii) the date the option to purchase such property is terminated. Whether or not any Real Estate is purchased, the Receiver shall be responsible for the payment of all real estate taxes with respect thereto payable during the period of use by the Assuming Bank. The Assuming Bank shall reimburse the Receiver (A) in respect of the portion of any real estate taxes paid by the Receiver subsequent to the Bank Closing, if any, assumed by the Assuming Bank pursuant to subsection 2.1 hereof and (B) for the portion of such taxes, if any, paid by the Receiver in respect of any Real Estate purchased by the Assuming Bank and relating to the period subsequent to the Bank Closing. The Assuming Bank, on behalf of the Receiver and as an additional license fee, shall be responsible for all normal and recurring maintenance, utility and other expenses incidental to its use of such property until the date of the purchase thereof or the later of the dates set forth in clauses (i) and (ii) above.

(b) With respect to any leased property within the purview of subsection 4.3 hereof which the Assuming Bank uses, as the licensee of the Receiver, until the date of any assignment of or sublease under the lease thereof or of the execution of any new lease thereof or the later of (i) the date such use is discontinued or (ii) the date the option to obtain an assignment of or sublease under the lease of such property is terminated, the Assuming Bank shall pay an interim license fee to the Receiver in cash equal to the rent and additional rent stipulated in the respective leases of such property (excluding any acceleration thereof

asserted by the lessor), less any rent payable by any sublessee for any period after the Bank Closing to the Receiver. Such interim license fee shall be paid no less than three business days prior to the date such rent or additional rent payment is due and payable. The Assuming Bank shall use its best efforts to collect, as agent for the Receiver, all rent from sublessees, and any such rent received by the Assuming Bank shall be paid by the Assuming Bank to the Receiver promptly after the receipt thereof. If the Assuming Bank uses, as licensee of the Receiver, and obtains an assignment of or sublease under the lease of such property or executes a new lease thereof, any interim license fee paid by the Assuming Bank to the Receiver shall be a credit against the Assuming Bank's liability in respect to such lease and, in the event the Assuming Bank is not given full credit under such lease for such interim license fee, the Receiver shall pay to the Assuming Bank in cash any deficiency less rent payable by any sublessees for any period after the Bank Closing but not collected and paid over to the Receiver. If the Assuming Bank does not obtain an assignment of or sublease under the lease of such property or does not execute a new lease thereof, the Assuming Bank shall pay to the Receiver, in cash, a license fee equal to the fair use value thereof, as determined pursuant to subsection 5.8 hereof, for its use of that portion of such property not occupied by sublessees, excluding leasehold improvements thereon, against which license fee there shall be credited any interim fee paid by it to the Receiver. To the extent that, after such credit, there is a net amount due to the Receiver from the Assuming Bank, such net amount shall be paid in cash and, to the extent that there is a net amount to be paid by the Receiver to the Assuming Bank, such net amount shall be paid in cash. The Assuming Bank's use, as licensee of the Receiver, of any leased real or personal property shall be subject to the terms of the respective governing leases, and the Assuming Bank shall use its best efforts to comply, as licensee of the Receiver, with the terms of such leases, except for the making of any payments of rent or additional rent thereunder. Any responsibility for the payment of rent and additional rent or other payment for use of any premises as may be required by law shall be the responsibility of the Receiver. The Assuming Bank shall, to the extent not provided for in the applicable lease, on behalf of the Receiver and as an additional license fee, be responsible for all normal and recurring maintenance, utility and other expenses incidental to its use of such leased premises.

5.7 *Office Space for the Receiver and Corporation.*

The Receiver may reserve for itself and the Corporation adequate furnished space (including cabinet and vault space) in any premises previously occupied by the Bank, at such of the Bank's locations as the Receiver and the Corporation determine are necessary in connection with their duties, including liquidation of the remaining assets and property of the Bank, and the Assuming Bank shall make such furnished space available at any premises to which records, assets and property of the Bank may, with the prior approval of the Receiver, have been removed by the Assuming Bank. The adequacy of the space as well as its location shall be determined by the Receiver and the Corporation in a reasonable manner giving due consideration to the requirements of the Assuming Bank. If the Assuming Bank purchases or obtains an assignment, sublease or new lease of such premises in which the Receiver has reserved space for itself and the Corporation, the Receiver and the Corporation shall pay to the Assuming Bank, in cash, the fair market rental value, as determined by the Property Appraiser, for their respective occupation of the premises from 180 days after the Bank Closing to the date that the premises are vacated by the Receiver or the Corporation. No payment shall be made to the Assuming Bank for such occupation of premises not so acquired.

5.8 *Determination of Fair Use Values.*

The fair use values provided for in this Section 5 shall be equal to the fair market rental value of the property as determined by the Property Appraiser (i) taking into account, when the use of leased property is being valued, the services furnished by the lessor under the respective lease and included in the periodic rent without additional charge and (ii) taking into account when the use of owned property is being valued that all normal and recurring operating expenses incidental to the use thereof are paid by the Assuming Bank and that real estate taxes are being paid by the Receiver.

5.9 *Nature of Use.*

Any use of any property by the Assuming Bank pursuant to this Section 5 shall be as a licensee of the Receiver, it being the intention of the parties that no such use shall be deemed to be or cause a ratification, rejection, assignment, sublease or exercise of an option to select to receive an assignment or sublease of any lease of real or personal property, or the exercise of any option to renew or purchase same.

SECTION 6. FIDUCIARY RELATIONSHIPS.

The Assuming Bank does not assume any of the fiduciary relationships of the Bank as fiscal or transfer agent, trustee, guardian, receiver, committee, executor, administrator or other fiduciary in any capacity or as custodian, bailee or depositary of personal property (except the duties and obligations assumed under Section 7 hereof).

SECTION 7. SAFE DEPOSIT BOXES, SAFEKEEPING AND CONSIGNMENT ITEMS, AND ESCROW AGREEMENTS.

The Assuming Bank agrees to assume and to honor and perform the duties and obligations of the Bank regarding its safe deposit boxes, safekeeping of property, escrow agreements and money and other property held thereunder and all items held on consignment which the Receiver hereby assigns and transfers to the Assuming Bank together with all records and keys relating thereto, provided the Assuming Bank (unless it is the owner or lessee thereof) continues to have access to the physical premises on which the same is located. Rental and other fees shall be prorated as of the Bank Closing. If the Assuming Bank does not purchase any such premises pursuant to subsection 4.2 hereof, or does not obtain an assignment of or sublease under the lease of any such premises or obtain a new lease with respect thereto within the 120-day or extended period set forth in subsection 4.3(a) hereof, the Assuming Bank nonetheless assumes full responsibility for closing out or transferring to another location such business in accordance with applicable law even though the closing out or transfer of such business may result in continued use, solely as the licensee of the Receiver, of all or a portion of the premises in question. If the Assuming Bank does not purchase the premises, obtain an assignment of or sublease under the lease of the premises or obtain a new lease with respect thereto and for any period during which the Assuming Bank, as licensee of the Receiver, uses the premises only to meet its obligations under this Section 7, it shall pay to the Receiver a license fee equal to the fair use value determined in accordance with subsection 5.8 hereof of those portions of the premises, including leasehold improvements thereon, containing the safekeeping facilities. The Assuming Bank shall be free to terminate any safekeeping or consignment agreement or activity, and to resign or withdraw as escrow agent under any escrow agreement, in accordance with the terms thereof.

SECTION 8. CREDIT CARD BUSINESS.

Except as otherwise provided in Section 9 hereof, the Assuming Bank agrees to assume, honor and perform all duties and obligations regarding the Bank's credit card business in so far as the same relates to consumers and merchants, and the Receiver assigns and transfers to the Assuming Bank all of the Bank's right, title and interest in and to such business.

SECTION 9. CONTRACTS FOR SERVICES.

9.1 *Service Obligations of the Bank.*

The Assuming Bank, acting on behalf of the Receiver, agrees to perform all duties and obligations of the Bank to render services under contracts outstanding at the Bank Closing requiring the performance of such services, such as, but not limited to, mortgage servicing contracts and electronic data processing time-sharing contracts. The obligations of the Assuming Bank hereunder shall run from the Bank Closing until 30 days thereafter, or such shorter period as may be permitted by the relevant contract. During such 30-day period the Assuming Bank may, at its option, elect to assume (to the extent permitted by the relevant contract) any or all such contracts, and the Receiver agrees to use its reasonable best efforts, to the extent requested by the Assuming Bank and consistent with the provisions of such contract and its responsibilities as Receiver, to assist the Assuming Bank to effect such assumption. Notwithstanding the foregoing, the Assuming Bank shall have no obligation to perform services where the Assuming Bank determines such performance might involve the incurring of significant liabilities or expenses in excess of income therefrom, and so notifies the Receiver. Upon receipt of such notice by the Receiver, the option to assume such contract shall be deemed terminated. Income from all service contracts shall be prorated as of the Bank Closing by making appropriate adjustments in accordance with Section 20 hereof. Notwithstanding any undertakings in this Agreement, the Assuming Bank shall have no obligation to continue to maintain and operate any custodial or similar account for any broker or dealer customer of the Bank to the extent such account has heretofore been used in connection with the clearance of such customer's brokerage or dealer transactions.

9.2 *Service and Maintenance Contracts.*

With respect to any contract providing for the rendering of services to the Bank outstanding as of the Bank Closing, the Receiver

shall, to the extent and for the period requested by the Assuming Bank, use its reasonable best efforts to make available to the Assuming Bank the continuing benefits of such contract. Within 30 days of the Bank Closing the Assuming Bank shall notify the Receiver of such contracts which it elects to assume and such contracts it elects not to assume but for which it requests the services provided thereby. The Assuming Bank shall pay, at the contract rate, for any services rendered to it pursuant to any such contract after the Bank Closing. The Receiver understands that, if the Assuming Bank is unable to obtain the benefits of certain contracts referred to in this subsection, it may be unable to perform certain of the functions, if any, which may be required of it in connection with the corporate agency business of the Bank referred to in Section 6 hereof. In such case the Receiver agrees to use its reasonable best efforts to assist the Assuming Bank in being relieved of the obligation to perform such functions.

9.3 *No Assumption.*

By performing the obligations of the Bank under contracts referred to in subsection 9.1 hereof, or receiving benefits under contracts referred to in subsection 9.2 hereof, the Assuming Bank shall not be deemed to have assumed any such contract nor any liability or obligation in respect of its termination unless the Assuming Bank shall have specifically designated such contract for assumption within the time period provided in subsection 9.1 or 9.2, or its later termination by the Receiver.

9.4 *Assignment of Contracts.*

In the event that the Assuming Bank shall assume any contract described in subsection 9.1 or 9.2 hereof, the Receiver shall assign all the Bank's and the Receiver's right, title and interest in such contract so assumed to the Assuming Bank.

SECTION 10. EMPLOYEES AND EMPLOYEE BENEFITS.

10.1 *Employees.*

The Assuming Bank may, if it desires, initially retain any and all employees of the Bank (free of all obligations of the Bank under employment contracts or arrangements and all other employee benefit arrangements, including without limitation any severance or termination payment arrangements) and shall have the right to discharge any employee at any time. The Assuming Bank shall bear all salary ex-

penses of retained employees for the period from the Bank Closing until the Assuming Bank reopens the offices and branches of the Bank. The Assuming Bank shall have no obligation with respect to the settlement of expense advances made by the Bank to employees retained by the Assuming Bank less than five business days following the Bank Closing.

10.2 *Receiver's Use of Employees.*

The Assuming Bank shall make available to the Receiver and the Corporation personnel of the Assuming Bank for consultation and for the performance of minor services during normal banking hours. With the Assuming Bank's permission, the Receiver or the Corporation may, for work to be done over an extended period (two working days), use the services of employees of the Assuming Bank designated by the Receiver or the Corporation and shall reimburse the Assuming Bank for the salary and fringe benefit expenses of such employees for such service rendered after five days following the Bank Closing.

10.3 *Retirement and Employee Benefit Plans.*

The Assuming Bank shall not be deemed to have assumed any obligations under any funded or unfunded retirement plan or other employee benefit plan of the Bank, other than whatever obligation, if any, the Assuming Bank may have to act as trustee pursuant to Section 6 hereof. The Receiver will cooperate with the Assuming Bank in obtaining such binding interpretations of the provisions and such administration of the assets of such plan, and in taking such other action in respect of such plan, as the Assuming Bank may desire, consistent with the best interests of the plan participants. If the Assuming Bank determines that its assumption, if any, of the trusteeships of any one or more of such plans creates a conflict of interest, the Assuming Bank and the Receiver will take such action as is necessary to obtain and have qualified another successor trustee.

SECTION 11. DUTIES WITH RESPECT TO DEPOSITORS.

11.1 *Payment of Obligations and Discharge of Business.*

The Assuming Bank agrees to pay all properly drawn checks, drafts and withdrawal orders presented to it by mail, over its counters

or through clearings by depositors whose deposits are assumed, whether drawn on the check or draft forms provided by the Bank (for at least one year after the Bank Closing) or on those provided by the Assuming Bank, to the extent that the assumed collected balances to the credit of the respective makers or drawers or the respective contracted overdraft privileges (other than those which have been terminated in accordance with their terms by the Assuming Bank) shall be sufficient to permit the payment thereof, and in all other respects to discharge, in the usual course of the banking business, the duties and obligations of the Bank and the Receiver with respect to the balances due and owing at the Bank Closing to the depositors whose deposits are assumed.

11.2 *Depositors' Claims against Receiver.*

If any of the depositors whose deposits are assumed, instead of accepting the obligation of the Assuming Bank to pay the deposit liabilities of the Bank and the Receiver, shall assert a claim against the Receiver for any part of any of such assumed deposit liabilities, the Assuming Bank agrees on demand to provide the Receiver with money sufficient to enable it to pay the claims of such depositor at the maturity thereof, not exceeding the amount (excluding for these purposes any amount credited subject to collection until collection is completed) credited to such depositor's account on the books and records of the Assuming Bank as of the time of making such demand. Upon the payment thereof to the Receiver, the Assuming Bank shall be discharged to the extent of such payment from any further liability to such depositor under this Agreement and the Receiver agrees to indemnify and hold the Assuming Bank harmless from any claims of, or liabilities to, such depositors, including, without limitation, any claims arising out of the refusal of the Assuming Bank to honor any checks or other instruments drawn on any of the accounts of such depositors to the extent transferred to the Receiver.

SECTION 12. NOTICES TO DEPOSITORS AND CREDITORS.

The Assuming Bank agrees and is hereby authorized, for and on behalf of the Receiver, to give notice to former depositors of the Bank of its assumption of the deposit balances of the Bank assumed by the Assuming Bank. Such notice shall be given to domestic depositors

within 30 days after the Bank Closing substantially in the form and manner required by Part 307 of the Corporation's regulations (12 C.F.R. Part 307 (1974)).

SECTION 13. RECORDS.

13.1 *Delivery to Assuming Bank of Liability and Other Documents.*

The Receiver hereby delivers to the Assuming Bank the following records pertaining to the deposit and other liabilities assumed, or to the business of the Bank to be conducted, by the Assuming Bank pursuant to this Agreement:

(a) Signature cards, orders and contracts between the Bank and its depositors, and all records of similar character.

(b) Depositors' passbooks held by the Receiver, deposit slips and cancelled checks or withdrawal orders representing charges to depositors' accounts.

(c) Any other files, documents, instruments, accounts and records relating to the liabilities, and other obligations, assumed or undertaken by the Assuming Bank.

(d) Any files, documents, instruments, accounts and records and all other property held by the Bank for the account of others relating to the Bank's trust (if any) and other business to be conducted by the Assuming Bank.

13.2 *Delivery to Assuming Bank of Asset Documents.*

The Receiver hereby delivers to the Assuming Bank the following records, instruments, documents and agreements of the Bank pertaining to the Available Assets, the assets purchased by the Assuming Bank pursuant to subsection 3.2 hereof, letters of credit described in subsection 2.3 hereof and the Bank's leases. Upon the rejection of Available Assets, the Assuming Bank's election to reassign to the Receiver the account party obligations on letters of credit pursuant to subsection 2.3 hereof, or the Assuming Bank's election not to take an assignment of or sublease under any lease or to execute a new lease with respect to any leased property, the Assuming Bank will promptly return all

records, instruments, documents and agreements relating to such Available Asset, account party obligation or lease to the Receiver:

(a) Records of deposit balances carried with other banks, bankers and trust companies.

(b) Deeds, mortgages, leases, abstracts, title insurance policies and reports, surveys and other instruments or records of title.

(c) Notes, securities, agreements, deeds of trust, mortgages, loan agreements, collateral of all kinds and all other related documents and instruments.

(d) All bonds and other evidences of obligations and securities.

(e) All other related files, documents, instruments, accounts and records (including information received by the Assuming Bank following the Bank Closing).

13.3 *Securities and Property Held by Nominee Partnerships.*

It is understood that the Bank has caused certain securities and certain other property held by it for its own account or for the account of third parties to be registered in the name of, or held by, certain nominee partnerships and that agreements have been entered into between the Bank and such partnerships with respect thereto. The Receiver shall, at the request of the Assuming Bank, exercise the rights of the Bank under such agreements, including its powers as agent and attorney in fact for such partnerships, and take such other action as shall be necessary to assign, endorse, transfer and deliver, or otherwise to deal with, all securities and other property which the Assuming Bank shall have purchased, or which relate to the Bank's trust and other business to be conducted by the Assuming Bank hereunder, registered in the name of, or held by, such partnerships.

SECTION 14. ACCESS TO PROPERTIES AND RECORDS.

14.1 *Receiver's and Corporation's Rights of Access.*

The Assuming Bank agrees at its expense to preserve and safely keep all of the files, documents, instruments, books of account, records and other similar papers transferred to it under this Agreement, or which may from time to time come into its possession as a result of this

Agreement, for the joint benefit of itself, the Receiver and the Corporation, to deliver to the Receiver and the Corporation such files, documents, instruments, books of account, records and other similar papers which may be in its possession but which relate to assets and liabilities not purchased, assumed or otherwise transferred under this Agreement and to permit the Receiver, the Corporation and the Comptroller of the Currency, or their designated representatives, at any reasonable time to inspect and make extracts from, or copies of, any of such files, documents, instruments, books of account, records and other similar papers which are transferred to it as a result of this Agreement. The Assuming Bank will permit the Receiver, the Corporation and the Comptroller of the Currency, and their designated representatives, to consult, as provided in subsection 10.2 hereof, with the Assuming Bank's officers and employees and at any reasonable time to inspect and inventory the properties, assets and rights described in this Agreement.

14.2 *Removal of Assets and Evidence of Liabilities not Purchased, Selected or Assumed.*

The Assuming Bank, as provided for in this Agreement, will also preserve and maintain for the benefit of the Receiver and the Corporation and will permit the Receiver or the Corporation at their discretion, or upon the request of the Assuming Bank, to remove all of the Bank's assets or evidences thereof and all evidences of liabilities not purchased by, or otherwise transferred to, or assumed by, the Assuming Bank under this Agreement, which are located in or upon any of the properties occupied by the Assuming Bank.

14.3 *Disposal of Records.*

The Assuming Bank may, with the prior written consent of the Receiver, dispose of any of the records of the Bank transferred to the Assuming Bank. If such consent is not given, the Assuming Bank may deliver such records to the Receiver.

14.4 *Assuming Bank's Right to Access.*

The Receiver agrees to preserve and safely keep all of the books of account and corporate records of the Bank, and, to the extent permitted by law, shall allow the Assuming Bank, or its designated repre-

sentatives, to inspect and make extracts from or copies of any such books of account and corporate records wherever located, at any reasonable time.

SECTION 15. FURTHER ASSURANCES.

The Receiver and the Assuming Bank agree at any time and from time to time upon request of either to execute and deliver such endorsements of instruments, assignments, deeds, notices of assignment, financing statements, releases, waivers, consents, termination statements, satisfactions, bond or stock powers and further instruments and documents of conveyance, release, satisfaction, waiver or consent and to join or participate in any petition, accounting, or judicial or regulatory proceeding as shall be necessary or proper to carry out the intent of this Agreement. The Receiver further agrees to use its best efforts to cause others (including, without limitation, the FRB and subsidiaries of the Bank) to execute and deliver such instruments and documents.

SECTION 16. REPRESENTATIONS, WARRANTIES AND COVENANTS OF THE ASSUMING BANK.

The Assuming Bank represents and warrants to, and covenants with, the Receiver as follows:

16.1 *Good Standing of Assuming Bank.*

The Assuming Bank is a bank duly organized and validly existing and in good standing under the laws of the jurisdiction of its incorporation, has corporate power to carry on its business as such and is duly authorized to do a banking business in the State of New York.

16.2 *Legal Powers of Assuming Bank.*

The Assuming Bank has the legal power to enter into and perform this Agreement and the Indemnity Agreement between the Corporation and the Assuming Bank of even date herewith (the "Indemnity Agreement"), and the consummation of the transactions contemplated by this Agreement and the Indemnity Agreement will not violate any provision of law or of its Organization Certificate or by-laws, or result in the breach of any provision of, or constitute a default

under, any indenture, agreement or other instrument to which the Assuming Bank is a party, or to which it or any of its properties may be subject, and this Agreement and the Indemnity Agreement constitute the valid and binding obligations of the Assuming Bank and are enforceable in accordance with their respective terms.

16.3 *Assuming Bank's Board Action.*

The Assuming Bank's Board of Directors has taken all action necessary for the Assuming Bank to enter into this Agreement and the Indemnity Agreement, and to seek all federal and state regulatory approvals required in order for the Assuming Bank to conduct the banking business at the branch and office locations of the Bank as contemplated by this Agreement. Immediately following the execution of this Agreement, the Assuming Bank shall apply for all such regulatory approvals.

SECTION 17. REPRESENTATIONS AND WARRANTIES OF THE RECEIVER.

The Receiver represents and warrants to, and covenants with, the Assuming Bank as follows:

17.1 *Power and Authority.*

The Receiver has the legal power and right to enter into and perform this Agreement and the transactions contemplated hereby and the consummation of the transactions contemplated by this Agreement will not violate any provision of law and this Agreement constitutes the valid and binding obligation of the Receiver and is enforceable in accordance with its terms.

17.2 *Corporation's Board Action.*

The Board of Directors of the Corporation has taken all action necessary for the Receiver to enter into this Agreement.

17.3 *Warranties as to Assets.*

The Receiver warrants that the assets sold to the Assuming Bank under subsection 3.2 hereof (other than assets listed on Schedule F), all collateral securing such assets and the mortgages and other pledge

or security agreements under which such collateral is held, and all securities selected by the Assuming Bank under subsection 3.3(a) of this Agreement, are legal, genuine and valid, and that all such assets and collateral have been sold and transferred to the Assuming Bank free of all liens, charges and other encumbrances, except that certain of the securities may be subject to pledges (directly or indirectly) made by the Bank as security for public deposits or for the faithful performance of the trust department of the Bank or be subject to repurchase agreements, and with respect to such collateral, except those permitted under the relevant security agreement, none of which secure obligations of or have been created by the Bank or the Receiver. As to all other assets (except the Real Estate, Personalty and leasehold improvements) sold to the Assuming Bank under this Agreement, Receiver warrants that they will be sold and transferred free of all liens, charges and other encumbrances placed on such assets by the Bank prior to the Bank Closing and as to which the Assuming Bank had no notice (including constructive notice by filing or recording or other public notice given in accordance with applicable law). Except as set forth above, all assets sold to the Assuming Bank hereunder are otherwise so sold and transferred without recourse and without any warranties whatsoever as to their legality, enforceability, genuineness, collectibility, documentation or freedom from liens, in whole or in part, or otherwise, it being the intention of the parties hereto that, for all purposes of this Agreement, the Assuming Bank's opportunity to select only those assets of the Bank which it so chooses and the method of valuation used pursuant to this Agreement shall be deemed sufficient protection to the Assuming Bank and shall constitute the agreed and accepted values of such assets, subject to adjustment only as provided in this Agreement. Settlement for breach of representations and warranties by the Receiver under this subsection 17.3 shall be by substitution of other assets for the assets as to which there is such a breach as provided in subsection 20.2 hereof.

17.4 *Foreign Assets.*

In the event that any assets selected or purchased by the Assuming Bank are made subject to, or are affected by, any court order or process, liquidation, winding up, execution, attachment or lien outside the United States, which is not dismissed or removed within 15 days of the occurrence thereof, the Receiver will post such bond or put up such security

or take such other measures as shall insure to the Assuming Bank the release of such assets, and all income paid or accrued thereon, from such order or process, liquidation, winding up, execution, attachment or lien within 45 days from the occurrence thereof.

17.5 *Survival of Representations and Warranties.*

The representations, warranties and covenants contained in this Section 17 survive the execution of this Agreement but expire two years after the Bank Closing.

SECTION 18. CONDITIONS TO AGREEMENT.

This Agreement shall not have any effect until all of the following conditions have been met:

18.1 *Opinion of Counsel for Assuming Bank.*

The Receiver shall have received the favorable written opinion, dated the date of this Agreement, of counsel for the Assuming Bank, substantially to the following effect:

(a) The Assuming Bank is a bank duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation, has corporate power to carry on its business as such and is duly authorized to do a banking business in the State of New York.

(b) All corporate action necessary to authorize the transactions hereunder and the execution and delivery by the Assuming Bank of other instruments and documents as contemplated hereby has been taken.

(c) This Agreement and the Indemnity Agreement have been duly authorized, executed and delivered by the Assuming Bank and constitute the valid and binding obligations of the Assuming Bank enforceable in accordance with their respective terms.

(d) The consummation of the transactions contemplated by this Agreement and the Indemnity Agreement will not violate any provision of law known to such counsel or of the Organization Certificate or by-laws of the Assuming Bank or result in the breach of any provision of, or constitute a default under, any

indenture, agreement or other instrument known to such counsel to which the Assuming Bank is a party.

Such opinion shall cover such other matters incidental to the transactions contemplated hereby as the Receiver may reasonably request and may have such qualifications and limitations in respect of the breadth of the foregoing as may be acceptable to the General Counsel of the Corporation.

18.2 *Accuracy of Representations.*

The representations and warranties made by the parties shall be true and accurate in all material respects as of the date of this Agreement.

18.3 *Regulatory Approvals.*

The responsible federal and state agency or agencies shall have approved consummation of the transactions contemplated by this Agreement, including approvals pursuant to 12 U.S.C. § 1828(c).

18.4 *Court Approvals.*

The Receiver shall have received all necessary court approvals, as required by 12 U.S.C. § 192, of the transactions contemplated by this Agreement, and shall have presented to the Assuming Bank evidence of such approvals, satisfactory in form and substance to counsel for the Assuming Bank.

18.5 *Opinion of Corporation Counsel.*

The Assuming Bank shall have received the favorable written opinion, dated the date of this Agreement, of the General Counsel of the Corporation, substantially to the following effect:

(a) The Receiver has the legal power and right to enter into and perform this Agreement and the transactions contemplated hereby, and has taken all necessary corporate proceedings to authorize the transactions contemplated by this Agreement, the performance by the Receiver of its obligations hereunder and the execution and delivery by the Receiver of all instruments and other documents contemplated hereby.

(b) This Agreement has been duly authorized, executed and delivered by the Receiver and constitutes the valid and binding obligation of the Receiver enforceable in accordance with its terms.

(c) The Corporation has the legal power and right to enter into and perform the Indemnity Agreement and the transactions contemplated thereby, and has taken all necessary corporate proceedings to authorize the transactions contemplated by the Indemnity Agreement, the performance by the Corporation of its obligations thereunder and the execution and delivery by the Corporation of all instruments and other documents contemplated thereby.

(d) The Indemnity Agreement has been duly authorized, executed and delivered by the Corporation and constitutes the valid and binding obligation of the Corporation enforceable in accordance with its terms.

Such opinion shall cover such other matters incidental to the transactions contemplated hereby as the Assuming Bank may reasonably request.

18.6 *Opinion of Counsel to the Comptroller.*

The Assuming Bank shall have received the favorable written opinion, dated the date of this Agreement, of the Chief Counsel of the Comptroller of the Currency, to the following effect:

(a) The Comptroller of the Currency has closed the Bank pursuant to the provisions of 12 U.S.C. § 191 and all necessary determinations have been made by the Comptroller of the Currency in connection therewith.

(b) The Corporation has been duly and regularly appointed receiver of the Bank pursuant to the provisions of 12 U.S.C. § 191 and 12 U.S.C. § 1821(c).

18.7 *Corporation Documents.*

The Assuming Bank shall have received certified copies of the following:

(a) The order of the Comptroller of the Currency closing the Bank pursuant to the provisions of 12 U.S.C. § 191 and appointing

the Corporation as receiver pursuant to the provisions of 12 U.S.C. § 191 and 12 U.S.C. § 1821(e).

(b) The corporate resolutions of the Corporation authorizing the Receiver to execute and deliver this Agreement and the Corporation to execute the Indemnity Agreement.

18.8 *Assuming Bank Documents.*

The Receiver shall have received certified copies of the following:

(a) The corporate resolutions of the Assuming Bank authorizing the Assuming Bank to execute and deliver this Agreement and the Indemnity Agreement.

(b) Incumbency certificates covering the officers of the Assuming Bank authorized to execute this Agreement and the Indemnity Agreement on behalf of the Assuming Bank.

(c) Written confirmation from the Assuming Bank that the corporate authorizations referred to in subsection 16.3 hereof have not been rescinded or amended.

18.9 *Bid Form.*

All of the conditions set forth in the bid form delivered to the Receiver, in which the Assuming Bank offers to purchase assets and assume liabilities of the Bank, shall have been met.

18.10 *Capital Note.*

The Corporation shall have purchased or the Assuming Bank shall be satisfied that the Corporation will purchase the subordinated capital note or notes of the Assuming Bank or the non-subordinated capital note or notes of any holding company incorporated in the United States which owns substantially all of the Assuming Bank's outstanding voting securities (herein called the "Capital Note"). The Capital Note shall be payable to the order of the Corporation.

18.11 *Indemnity Agreement.*

The Corporation shall have entered into the Indemnity Agreement with the Assuming Bank in form and substance satisfactory to the Assuming Bank and its counsel.

18.12 *Release of FRB Security Interest.*

The Assuming Bank shall have received a duplicate original copy of a letter addressed to the Corporation from the FRB, in form and substance satisfactory to the Assuming Bank and its counsel, with respect to the release of the FRB Security Interest in all assets acquired or to be acquired by the Assuming Bank pursuant to this Agreement and as to the approximate amount of the FRB Indebtedness as of the Bank Closing.

SECTION 19. PAYMENT OF PREMIUM.

As consideration for the transfer of the assets and the business purchased hereunder, the Assuming Bank agrees to pay a premium equal to the difference between the liabilities assumed pursuant to subsection 2.1 hereof and the aggregate values and purchase prices of the assets purchased pursuant to subsections 3.2 and 3.3 and Section 4 hereof, as determined under the applicable provisions of this Agreement. The amount of this premium is $125,000,000 and it shall be paid as set forth in subsection 3.3 hereof.

SECTION 20. ADJUSTMENTS.

20.1 *Adjustments from New Schedules.*

All computations necessary for calculating the Additional Asset Value shall be based upon the liabilities set forth in Schedule B and the assets set forth in Schedules C, D, E and F. It is understood, however, that these Schedules and Schedules A and G are as of dates other than the Bank Closing and that certain of the figures set forth in such Schedules may be as of different dates. It is further understood that the descriptions and Schedules of liabilities and assets transferred to and assumed by the Assuming Bank may not be complete because of the lack of full information concerning the Bank's operations, and that certain liabilities and assets of a nature similar to those set forth in such Schedules have not been included therein because they were carried in the Bank's suspense or miscellaneous accounts at the Bank Closing. The Receiver, within 30 days after the Bank Closing or as soon thereafter as possible, shall prepare new Schedules as of the Bank Closing of liabilities actually assumed under subsection 2.1 hereof, assets purchased under subsection 3.2 hereof, the Available Assets and, subject to

the provisions of subsection 2.3(c) hereof, letters of credit assumed under subsection 2.3 hereof. Such new Schedules shall be prepared in accordance with the accounting standards and policies employed by the Comptroller of the Currency in the Instructions for the Preparation of Reports of Condition by National Banking Associations in effect on the Call Date immediately preceding the Bank Closing. Such new Schedules shall include such additional liabilities and assets which are of a nature similar to those set forth in the applicable Schedules and which were, at the Bank Closing or as of the date such Schedules were prepared, carried in the Bank's suspense or miscellaneous accounts or not posted by the Bank. Such new Schedules shall also include accruals as of the Bank Closing for all income and expenses related to assets and operations of the Bank acquired by the Assuming Bank under this Agreement and all normal and recurring operating expenses (other than Federal, state and local income tax accruals) and expenses related to liabilities assumed by the Assuming Bank under this Agreement, whether or not the Bank reflected such accruals on its books in the normal course of its operations. Such new Schedules shall be prepared on the basis of the best information then available to the Receiver. In the event that any of the new Schedules prepared by the Receiver are unsatisfactory to the Assuming Bank, such Schedules shall be reviewed by independent certified public accountants satisfactory to the Receiver and the Assuming Bank to ascertain whether the items shown on such new Schedules are in compliance with this Agreement and are in accordance with the accounting standards and policies employed by the Comptroller of the Currency in the Instructions for the Preparation of Reports of Condition by National Banking Associations in effect on the Call Date immediately preceding the Bank Closing or whether the amounts shown on such new Schedules are in accordance with generally accepted accounting principles in the United States in effect on the Bank Closing, as the case may be. The opinion of such independent certified public accountants with respect to the items and amounts shown on such new Schedules shall be final. Following review of such Schedules by the independent certified public accountants, new Schedules reflecting the results of the review shall be prepared. The Assuming Bank shall pay the fees and costs of such accountants. The parties agree that within ten days of the preparation of such new Schedules, the Additional Asset Value shall be adjusted to reflect differences on account of trans-

actions up to the date the Additional Asset Value is adjusted. The books and records of the Bank as of the Bank Closing shall be adjusted to reflect all adjustments to the Schedules and all new Schedules as of the Bank Closing provided for in this Agreement.

20.2 *Adjustments for Errors or Omissions.*

In the event any omission or error in the attached Schedules shall be discovered in compiling the new Schedules required by this Section 20 or in completing the transfers and assumptions contemplated by this Agreement, the parties severally agree to adjust therefor by an adjustment to the amount of the Additional Asset Value and to the books and records of the Bank as of the Bank Closing if appropriate, it being the intention of the parties that the assets to be transferred pursuant to subsections 3.2 and 3.3 and Section 4 hereof, valued as set forth therein, plus the premium described in Section 19 hereof, shall equal the liabilities assumed pursuant to subsection 2.1 hereof, valued as set forth therein. Any omission or error discovered after, or any breach of any representation or warranty set forth in subsection 17.3 hereof and discovered after, 180 days from the Bank Closing (or earlier reduction in the Additional Asset Value to zero) and up to two years after the Bank Closing shall be settled, to the extent practicable, (i) by the transfer to the Assuming Bank or retransfer to the Receiver, as the case may be, and without recourse or warranty, of assets then held by the Receiver and the Assuming Bank, respectively, at fair market value (to be determined by an appraiser jointly designated by the Receiver and the Assuming Bank) for assets transferred to the Assuming Bank and at the values specified in this Agreement for assets of the type involved for assets retransferred to the Receiver, the Assuming Bank to make the selection of such assets, with any minor ($25,000 or less) difference between the adjustment required and the assets transferred or retransferred being settled in cash or (ii) in cash if the assets of the Bank then held by the Receiver or the Assuming Bank, as the case may be, are insufficient to settle the amount of such omissions or error or the obligations of the Receiver resulting from the breach of a representation or warranty set forth in subsection 17.3 hereof. No adjustment of the Schedules or the books and records of the Bank and no settlement under this Agreement shall be made for any error or omission discovered more than two years after the Bank Closing.

20.3 *Unlawful Deposit Liabilities.*

If it is discovered subsequent to the date hereof that any portion of the deposit liabilities assumed by the Assuming Bank constitute funds the depositor obtained from the Bank as a result of an unauthorized or unlawful transaction as determined by the Receiver, the Assuming Bank shall pay to the Receiver, upon its demand, any such funds then on deposit, and the Assuming Bank shall be discharged from further liability to such depositor under this Agreement and shall be indemnified and held harmless by the Receiver, to the extent of the payment so made to the Receiver, from such liability.

20.4 *Limitation on Adjustments to Liabilities Assumed.*

To the extent that the adjustments called for by the provisions of this Agreement, including adjustments reflected in new Schedules prepared pursuant to subsection 20.1 hereof or for errors or omissions pursuant to subsection 20.2 hereof, shall within 180 days after the Bank Closing increase the value of the liabilities assumed hereunder by the Assuming Bank pursuant to Section 2 hereof in an aggregate amount in excess of five percent of the total liabilities of the Bank (other than the FRB Indebtedness) as reflected in the trial balance of the Bank as of the close of business on the second banking business day preceding the day of the Bank Closing heretofore delivered by the Receiver to the Assuming Bank, the Receiver, upon the making of such adjustment, shall pay to the Assuming Bank an amount in cash equal to such excess, and such excess shall not result in an increase in the Additional Asset Value.

SECTION 21. SETTLEMENT OF CLAIMS.

The Receiver or the Corporation shall have the right, at its option, to defend or settle any claim or suit against the Assuming Bank which may result in a loss to the Receiver or the Corporation, if such claim or suit is subject to the Indemnity Agreement or any indemnity obligation contained in this Agreement, and arises out of this Agreement or existed against the Bank on or before the Bank Closing. The Assuming Bank shall have no duty to defend or take any action with respect to any such claim or suit, but the Assuming Bank shall cooperate in the defense of such claim or suit to the extent reasonably required by the Receiver or the Corporation.

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SECTION 22. RESCISSION.

If an injunction or other court order is issued or there is an attachment, security interest, lien (other than the FRB Security Interest) or transfer covering a substantial part of the assets of the Bank which has not been discharged, vacated or rescinded, and in the reasonable judgment of the Assuming Bank such injunction or other court order, or attachment, security interest, lien, or transfer substantially interferes with the purchase or selection and transfer of assets of the Bank to the Assuming Bank as contemplated by this Agreement, then this Agreement shall be rescinded and the parties restored to their positions prior to the Bank Closing, unless the Receiver is able to transfer other assets which, in the reasonable judgment of the Assuming Bank, are substantially equivalent in value without such impediment. In the event of rescission, all liabilities assumed by and all assets transferred to the Assuming Bank shall become liabilities and assets of the Receiver as of the Bank Closing.

SECTION 23. MISCELLANEOUS.

23.1 *Schedules.*

All Schedules herein referred to shall constitute a part of this Agreement.

23.2 *Counterparts.*

This Agreement may be executed in any number of counterparts, each of which shall constitute one and the same instrument, and any party hereto may execute this Agreement by signing any such counterpart.

23.3 *Successors; No Third Party Rights.*

All covenants, representations, warranties and conditions of this Agreement shall be binding on the successors and assigns of the Assuming Bank and the Receiver. Nothing expressed or referred to in this Agreement is intended or shall be construed to give any person other than the Assuming Bank, the Receiver and the Corporation any legal or equitable right, remedy or claim under or in respect of this Agreement, or any provision herein contained, it being the intention of the parties hereto that this Agreement, the assumption of obligations and statements of responsibilities hereunder and all other conditions

and provisions hereof are for the sole and exclusive benefit of such parties and for the benefit of no other person.

23.4 *Headings.*

The headings of the Sections and subsections contained in this Agreement are inserted for convenience only and shall not affect the meaning or interpretation of this Agreement or any provision hereof.

23.5 *Notices.*

Any notice, request, demand or other communication to either of the parties hereto, or to the Corporation, shall be deemed given when received and shall be given in writing, and delivered against receipt therefor, or sent by certified mail, postage prepaid, to such party at its address set forth below or at such other address as such party shall hereafter furnish in writing.

Receiver

FEDERAL DEPOSIT INSURANCE CORPORATION
550 17th Street N.W.
Washington, D.C. 20429

Attention: Chief, Division of Liquidation

Assuming Bank

EUROPEAN-AMERICAN BANK & TRUST COMPANY
10 Hanover Square
New York, New York 10005

Attention: President

Corporation

FEDERAL DEPOSIT INSURANCE CORPORATION
550 17th Street N.W.
Washington, D.C. 20429

Attention: Office of the Chairman

23.6 *Fees of Appraisers and Title Company Charges.*

All fees of Appraisers for appraisals provided for in this Agreement shall be borne one half by the Assuming Bank and one half by the Receiver. All charges of the Title Company, including fees for title insurance, with respect to the Real Estate and leasehold improvements purchased by the Assuming Bank shall be paid by the Assuming Bank and all charges of the Title Company with respect to the Real Estate

and leasehold improvements not purchased by the Assuming Bank shall be borne one half by the Assuming Bank and one half by the Receiver.

23.7 *Governing Law.*

This Agreement and the rights and obligations hereunder shall be governed by the law of the State of New York to the extent that Federal law does not control. Nothing in this Agreement shall require any unlawful action or inaction by either party hereto.

23.8 *Continuing Cooperation.*

The purposes of this Agreement and the transactions provided for herein are to provide a means by which depositors and other creditors of the Bank may be protected against losses, the convenience and needs of the various communities in which the Bank's offices are located may be served, the Assuming Bank may receive the benefits and assume the risks contracted for and the risk of loss to the Corporation may be reduced. Although the Assuming Bank is expected to incur certain business risks with respect to the assets purchased by it hereunder and with respect to the operations of the Bank conducted by it after the Bank Closing, it is intended that the purposes of this Agreement be accomplished without imposing an unreasonable financial burden on the Assuming Bank. The parties therefore agree that they shall in good faith, and with their best efforts, cooperate with one another to carry out the purposes of this Agreement as herein described.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the time, day and year first above written.

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER OF FRANKLIN NATIONAL BANK

By GEORGE W. HILL
Title: *Chief, Division of Liquidation*

EUROPEAN-AMERICAN BANK & TRUST COMPANY

By H. E. EKBLOM
Title: *Chairman*

STUART W. MARSH
Title: *Assistant Secretary*

ANNEX 1

INSTRUCTIONS TO SECURITIES APPRAISERS

1. The Securities Appraisers are to determine the fair market value of all securities available for selection and not previously rejected by the Assuming Bank. Schedules of such securities will be provided by the Receiver.

2. The Securities Appraisers shall base their determination of the fair market value on the assumption that the securities are being sold by a willing seller to a willing buyer on the Bank Closing or later date referred to in paragraph 5 below. In determining the fair market value of debt securities for which there is no trading market the Securities Appraisers, if they deem it appropriate, may take into account such factors as appropriate credit-quality ratings, financial and economic data and geographic location.

3. All securities should be valued as though they were to be sold as quickly as possible in an orderly fashion, taking into account any effect large concentrations may have on the fair market value of any issue. If the Securities Appraisers feel that the entire amount of any security in the Bank's portfolio, other than securities issued by the United States Treasury, United States agencies or United States corporations, cannot be sold during the 30 days following the date that notice of determination of its value is given to the Receiver and the Assuming Bank without abnormally changing the price of that security, then the Securities Appraisers should modify the fair market value of that security to reflect their estimate of the changed price of that security which would result from such sale within that period. In making the judgment required by this paragraph, the Securities Appraisers should disregard their estimate of future movements in the price of the security unrelated to the sale of the entire amount of the security in the Bank's portfolio. Any modification in their determination of value should relate solely to the quantity of the security which must be sold within the 30 day time period.

The Securities Appraisers should not modify the fair market value of any security issued by the United States Treasury, United States agencies, or United States corporations, notwithstanding the volume of

any such issue being sold. The fair market value of such a security shall be determined without the adjustments referred to in this paragraph 3.

4. At the close of each business day, the Securities Appraisers will deliver to the Assuming Bank and the Receiver, in writing, their separate determinations of values of all securities valued by them during that day. Insofar as possible, the following order of priority shall be followed by the Appraisers:

a. Securities issued by the United States Treasury.

b. Securities issued by United States government agencies.

c. Securities issued by a state or a political subdivision, in order of maturity, shortest maturities first.

d. Securities issued by any other corporation or business entity for which a regular trading market exists.

e. Securities for which a regular trading market does not exist.

f. Other securities.

The Securities Appraisers shall coordinate this order of appraisals to ensure that the Assuming Bank and the Receiver receive each Securities Appraiser's determination of fair market value for each issue as close in time to each other as possible.

5. The Securities Appraisers will determine values for all securities as promptly as practicable. While it is expected that all securities shall be valued within 15 days of the Bank Closing, it is recognized that some may not be, and that determination of value for some securities may not occur for some period of time in excess of 15 days. All securities must be valued within 150 days.

In the event that the determination for some securities is not made within such 15 day period, the Receiver or the Assuming Bank may call on the Securities Appraisers to revalue such securities as of the second banking business day following the request by the Receiver or the Assuming Bank for revaluation. If such request is made, the Securities Appraisers will value the securities in the manner provided above, except that the appropriate valuation date will not be the Bank Closing but rather the newly determined date.

6. The Securities Appraisers shall also determine the fair market value of the stock referred to in subsection 4.4(e)(i) of the Purchase and Assumption Agreement. If either of the Securities Appraisers do not wish to make such determination, they may retain such experts as they choose to make such determination, the compensation for which shall be first approved by the Receiver and the Assuming Bank.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

HUNTINGTON TOWERS, LTD. and RICHARD CAREY, Plaintiffs, -against- FRANKLIN NATIONAL BANK (in Liquidation), FEDERAL DEPOSIT INSURANCE CORPORATION, FEDERAL RESERVE BANK OF NEW YORK, EUROPEAN-AMERICAN BANK & TRUST COMPANY and JAMES SMITH, individually and as Comptroller of the Currency, Defendants.	:	75 Civ. 909 (OGJ)

Statement Under General Rule 9(g)
of the Rules of this Court

Pursuant to Rule 9(g) of the General Rules of this Court, defendant European-American Bank & Trust Company ("European-American") submits this statement of the material facts as to which no genuine issue exists to be tried in support of its motion for summary judgment.

A. First Claim

1. Plaintiffs are seeking to enforce a contract concerning real property or in the alternative are seeking to enforce a contract which could not be performed within one year from the making thereof.

2. There is no note, memorandum or writing evidencing such a contract or the terms of such a contract that is subscribed by the party to be charged.

B. Second Claim

3. On October 8, 1974, European-American purchased certain of the assets of the Franklin National Bank ("Franklin") from Franklin's receiver, the Federal Deposit Insurance Corporation ("FDIC") for value and in good faith.

4. In the Purchase and Assumption Agreement executed between European-American and the FDIC, European-American did not assume liabilities to parties alleging that the receiver wrongfully disposed of such assets.

SULLIVAN & CROMWELL

By _____
(A Member of the Firm)
Attorneys for Defendant
European-American Bank and
Trust Company
48 Wall Street
New York, New York 10005
(212) 952-8100

NOTICE OF MOTION
OF FRANKLIN NATIONAL BANK TO DISMISS COMPLAINT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HUNTINGTON TOWERS, LTD. and RICHARD CAREY, Plaintiffs, -against- FRANKLIN NATIONAL BANK (in liquidation), FEDERAL DEPOSIT INSURANCE CORPORATION, FEDERAL RESERVE BANK OF NEW YORK, EUROPEAN AMERICAN BANK and JAMES SMITH, individually and as Comptroller of the Currency, Defendants.	75 C. 972 (O.G.J.) NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE, that upon the Complaint and all of the proceedings in this action, the undersigned will move this Court in Courtroom 11, at the United States Court House, 225 Cadman Plaza East, Brooklyn, New York 11201, on September 26, 1975 at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order:

(1) pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, dismissing the complaint herein as against Franklin National Bank (in liquidation) for failure to state a claim upon which relief may be granted; and

(2) granting such other and further relief as to the Court may seem just and proper.

NOTICE OF MOTION
OF FRANKLIN NATIONAL BANK TO DISMISS COMPLAINT

Dated: New York, New York
September 15, 1975

Yours, etc.

HUGHES HUBBARD & REED

By _____
A Member of the Firm
Attorneys for Federal Deposit Insurance Corporation as Receiver of Franklin National Bank (in liquidation)
One Wall Street
New York, New York 10005
(212) WH 3-6500

To:

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of New York
Attorney for Defendant
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Brooklyn, New York 11201

NOTICE OF MOTION OF F.D.I.C.
TO DISMISS COMPLAINT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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HUNTINGTON TOWERS, LTD. and RICHARD CAREY,

Plaintiffs,

-against-

FRANKLIN NATIONAL BANK (in liquidation), FEDERAL DEPOSIT INSURANCE CORPORATION, FEDERAL RESERVE BANK OF NEW YORK, EUROPEAN AMERICAN BANK and JAMES SMITH, individually and as Comptroller of the Currency,

Defendants.

- x

75 C. 972
(O.G.J.)

NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE, that upon the Complaint and all of the proceedings in this action, the undersigned will move this Court in Courtroom 11, at the United States Court House, 225 Cadman Plaza East, Brooklyn, New York 11201, on September 26, 1975 at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order:

(1) pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure ("Federal Rules"), dismissing the complaint herein as against Federal Deposit Insurance Corporation ("FDIC") for lack of subject matter jurisdiction;

(2) pursuant to Federal Rule 12(b)(6), dismissing the complaint herein as against FDIC for failure to state a claim upon which relief may be granted; and

(3) granting such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
September 15, 1975

Yours, etc.

HUGHES HUBBARD & REED

By Amalya L. Kearse
A Member of the Firm
Attorneys for Federal
Deposit Insurance
Corporation
One Wall Street
New York, New York 10005
(212) WH 3-6500

To:

SHEA GOULD CLIMENKO KRAMER
& CASEY
Attorneys for Plaintiffs
330 Madison Avenue
New York, New York 10017

CAHILL GORDON & REINDEL
Attorneys for Defendant
Federal Reserve Bank of New York
80 Pine Street
New York, New York 10005

SULLIVAN & CROMWELL
Attorneys for Defendant
European American Bank
48 Wall Street
New York, New York 10005

DAVID G. TRAGER, Esq.
United States Attorney
for the Eastern District
of New York
Attorney for Defendant
James Smith
225 Cadman Plaza East
Brooklyn, New York 11201

CTS:HAB:gp
F. 750800

NOTICE OF MOTION OF JAMES SMITH
TO DISMISS COMPLAINT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

HUNTINGTON TOWERS, LTD., et ano.,

Plaintiffs

-against-

FRANKLIN NATIONAL BANK (In Liquidation), et al ,

Defendants

- X

Civil Action
No. 75 C 1931

NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE that defendant JAMES E. SMITH, Comptroller of the Currency, will bring the annexed motion on for hearing before the Honorable Orrin G. Judd, United States District Judge, at Courtroom 11, United States Court House, 225 Cadman Plaza East, Brooklyn, New York, on the 30th day of October, 1975 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: Brooklyn, New York
September 26, 1975

Yours, etc.

DAVID G. TRAGER
United States Attorney
Attorney for Defendant
James E. Smith

By: H. G. Brachtl
HENRY A. BRACHTL
Assistant U.S. Attorney
225 Cadman Plaza East
Brooklyn, New York 11201

TO:

HUGHES, HUBBARD & REED
Attorneys for Federal
Deposit Insurance Corp.
One Wall Street
New York, N. Y. 10005

SHEA, GOULD, CLIMENKO, KRAMER
& CASEY
Attorneys for Plaintiffs
330 Madison Avenue
New York, N. Y. 10017

CAHILL, GORDON & REINDEL
Attorneys for Defendant
Federal Reserve Bank of New York
80 Pine Street
New York, N. Y. 10005

BEST COPY AVAILABLE

SULLIVAN & CROMWELL
Attorneys for Defendant
European American Bank
48 Wall Street
New York, N. Y. 10005

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

HUNTINGTON TOWERS, LTD. and RICHARD CAREY, Plaintiffs, v. FRANKLIN NATIONAL BANK (in liquidation), FEDERAL DEPOSIT INSURANCE CORPORATION, FEDERAL RESERVE BANK OF NEW YORK, EUROPEAN AMERICAN BANK and JAMES E. SMITH, individually and as Comptroller of the Currency, Defendants.	Civil Action No. 75 CIV 1934

DEFENDANT COMPTROLLER'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendant James E. Smith, Comptroller of the Currency of the United States, by his undersigned attorneys, moves the Court pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, to dismiss this action upon the grounds that the Court lacks jurisdiction over the subject matter of this action.

In the alternative, defendant James E. Smith moves the Court pursuant to Rule 56(b), F.R.Civ.P., for summary judgment in his favor upon the grounds that the affidavits of the Comptroller and of the Secretary of the Treasury annexed hereto demonstrate that, in all matters connected with the affairs of Franklin National Bank, defendant James E. Smith was at all times acting in his official capacity as Comptroller of the Currency and pursuant to his statutory responsibilities; therefore, he is immune from personal liability or suit based upon such actions.

In support of this motion, the Court is respectfully referred to the complaint; the affidavit of James E. Smith dated August 29 , 1975, and the affidavit of William E. Simon, Secretary of the Treasury, dated September 4 , 1975

which affidavits are annexed hereto and made parts hereof, as Exhibits "A" and "B" respectively, and to the memorandum of points and authorities which is filed herewith.

Respectfully submitted,

REX E. LEE
Assistant Attorney General

DAVID G. TRAGER
United States Attorney

By: HENRY A. BRACHTL
Assistant U. S. Attorney

HARLAND F. LEATHERS

DAVID C. SHONKA

Attorneys, Department of Justice
Attorneys for defendant
James E. Smith

OF COUNSEL:

DOROTHY KULIG

EDWARD JIRAN

Attorneys, Office of the
Comptroller of the Currency

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

HUNTINGTON TOWERS, LTD. and RICHARD CAREY, Plaintiffs,	
v.	Civil Action No. 75 CIV 1934
FRANKLIN NATIONAL BANK (in liquidation), FEDERAL DEPOSIT INSURANCE CORPORATION, FEDERAL RESERVE BANK OF NEW YORK, EUROPEAN AMERICAN BANK and JAMES E. SMITH, individually and as Comptroller of the Currency, Defendants.	

DEFENDANT COMPTROLLER'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to General Rule 9(g) of the local rules of this Court, the defendant Comptroller, by and through his undersigned attorneys, hereby submits the following statement of material facts as to which the defendant Comptroller contends there is no genuine issue:

1. Defendant Comptroller of the Currency is and was at all times alleged in plaintiffs' complaint a duly appointed official of the United States Government. Among his official duties, the Comptroller is responsible for the supervision and regulation of national banks (12 U.S.C. §1, et seq.) including the determination as to when a receiver should be appointed to close up a national bank because the Comptroller has become satisfied of the bank's insolvency (12 U.S.C §191). (Smith Affidavit, ¶2.)

2. A regular bank examination of Franklin National Bank from November 1973 through March 1974, revealed serious financial problems in the bank and a potential liquidity crisis. (Smith Affidavit, ¶4.)

3. Announcements were made on May 12, 1974 by Franklin National Bank's holding corporation, Franklin New York Corporation, that the bank had suffered a $12 million loss resulting from the bank's speculation in foreign currencies, that projected additional losses would total approximately $25 million, and that a request had been made to the Securities and Exchange Commission to suspend trading in the company's securities. These announcements caused a dramatic decline in the ability of Franklin National Bank to borrow funds and a large run-off of borrowings and money-market instruments, all of which caused a severe cash drain from the bank which could be met only by large borrowings from the Federal Reserve Bank of New York. (Smith Affidavit, ¶¶6, 7.)

4. Announcements on June 20, 1974 by Franklin New York Corporation of additional bank losses and the Corporation's restated earnings showing net losses further weakened the position of Franklin National Bank. (Smith Affidavit, ¶8.)

5. During May and the succeeding months of 1974, the Comptroller's Office was actively engaged in the development of long-term solutions to the problems of Franklin National Bank. Such activities included obtaining sources of borrowed funds for Franklin National Bank; negotiations with other commercial banks for the purchase of Franklin's Eurocurrency loans; inquiries of several commercial banks to purchase Franklin National Bank; and negotiations with the Federal Deposit Insurance Corporation to develop a plan to assist a purchase and assumption of Franklin National Bank's assets and liabilities by another commercial bank. (Smith Affidavit, ¶¶9-13.)

6. On August 14, 1974, a special examination of Franklin National Bank revealed a substantial impairment of the bank's equity capital. (Smith Affidavit, ¶14.)

7. On October 7, 1974, the Federal Reserve Bank of New York informed the Comptroller that it no longer viewed the continuation of its program of credit assistance to Franklin National Bank to be in the public interest, but that it believed that the plan developed by the Federal Deposit Insurance Corporation to assist a purchase and assumption of the assets and liabilities of the bank should be the solution to the bank's problems. (Smith Affidavit, ¶15.)

8. On October 8, 1974, at 3:00 p.m., the Comptroller of the Currency having become satisfied of the insolvency of Franklin National Bank, declared the bank to be insolvent and appointed the Federal Deposit Insurance Corporation as receiver. (Smith Affidavit, ¶¶16, 17.)

9. On October 8, 1974, this Court approved the Federal Deposit Insurance Corporation's proposal for a purchase and assumption of the assets and liabilities of Franklin National Bank by European American Bank. (Smith Affidavit, ¶19.)

Respectfully submitted,

REX E. LEE
Assistant Attorney General

DAVID G. TRAGER
United States Attorney

By: HENRY A. BRACHTL
Assistant U. S. Attorney

HARLAND F. LEATHERS

DAVID C. SHONKA

Attorneys, Department of Justice
Attorneys for defendant
JAMES E. SMITH

OF COUNSEL:

DOROTHY S. KULIG

EDWARD JIRAN

Attorneys, Office of the
Comptroller of the Currency

EXHIBIT A
AFFIDAVIT OF JAMES SMITH **JA 115**

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

HUNTINGTON TOWERS, LTD. and RICHARD CAREY, Plaintiffs,	)	
v.	)	Civil Action No. 75 CIV 1934
FRANKLIN NATIONAL BANK (in liquidation), FEDERAL DEPOSIT INSURANCE CORPORATION, FEDERAL RESERVE BANK OF NEW YORK, EUROPEAN AMERICAN BANK and JAMES E. SMITH, individually and as Comptroller of the Currency, Defendants.	)	

AFFIDAVIT

City of Washington)
District of Columbia) ss

I, JAMES E. SMITH, being duly sworn, depose and say as follows:

1. I am the Comptroller of the Currency of the United States. I have held that position since July 5, 1973.

2. The Office of the Comptroller of the Currency was established in 1863 and is a bureau of the United States Department of the Treasury. The Comptroller supervises the national banking system and is charged with the responsibility for executing laws relating to the national banking system. 12 U.S.C. §§1 and 2. Among his official duties, the Comptroller determines when a receiver should be appointed to close up a national bank because the Comptroller has become satisfied of the bank's insolvency (12 U.S.C. §191).

3. Franklin National Bank, Brooklyn, New York, was a national bank supervised by the Comptroller of the Currency. Franklin National Bank was chartered by the

Comptroller's Office in 1926. In 1969, the Comptroller approved the corporate reorganization under which all outstanding shares of Franklin National Bank, except for directors' qualifying shares, were acquired by Franklin New York Corporation. Franklin New York Corporation is a publicly owned company whose securities are registered with the Securities and Exchange Commission ("SEC") and whose only substantial asset is shares of Franklin National Bank. As of December 31, 1973, Franklin National Bank was the twentieth largest bank in the United States with total resources of $5 billion, total deposits of $3.7 billion, total loans of $2.4 billion, and with a main office and 103 domestic branches, most of which were located on Long Island, New York.

4. A regular examination of Franklin National Bank by the Office of the Comptroller of the Currency pursuant to 12 U.S.C. §481 began on November 14, 1973, and concluded on March 8, 1974. This examination disclosed that Franklin had serious financial problems. As of November 14, 1973, total resources had grown to $4.9 billion or 29 percent greater than shown by the prior examination of the bank on December 8, 1972. In the same period however, the capital of the bank had increased less than one-half of one percent, and demand and savings deposits had declined by 5.5 percent. The bank's growth had been financed almost entirely by the use of short-term borrowed funds, including so-called money-market certificates of deposit and time deposits of other banks. These funds totaling $2.3 billion, or 50 percent of the bank's liabilities, were of a highly volatile nature and were likely to be withdrawn from the bank rapidly in the event that there was any reason to

question the soundness or stability of Franklin National Bank. In addition, the November 14 examination showed uncollectable loans totaling $10 million and loans whose credit quality was criticized, although the loans were not necessarily deemed uncollectable, of $275 million. The amount of the criticized loans equaled 162 percent of the bank's equity capital of $170 million. The bank also had outstanding $3.8 billion in contracts to buy or sell foreign currency at a future date, a volume which far exceeded the bank's normal needs and showed heavy speculation in foreign currency. Moreover, the bank's operating income was poor. It was apparent that the bank's poor earnings, potential loan losses, or extended foreign exchange position might easily cause a loss of confidence in the bank, which in turn would result in a serious and overwhelming liquidity crisis. Representatives of the Comptroller's Office met with the bank's board of directors to advise them of my concern about the bank's condition and to seek corrective action.

5. During the week of May 6, 1974, the Comptroller's Office and the Federal Reserve System learned from Franklin National Bank that severe losses, whose exact amount had not yet been determined, had occurred in Franklin's foreign exchange department. The management of Franklin New York Corporation decided to announce these losses, and it was apparent that such an announcement would dry up the bank's sources of borrowed funds, thus resulting in a severe liquidity crisis. In anticipation of this liquidity crisis, Franklin sought approval for an immediate and massive loan from the Federal Reserve Bank of New York should it become necessary.

6. On Friday, May 10, 1974, Franklin New York Corporation announced that its management would recommend to its board of directors at the board's next scheduled meeting on Thursday, May 16, that the board not declare the regular dividends on the company's common stock and convertible preferred stock. On Sunday, May 12, 1974, Franklin New York Corporation announced that the foreign exchange department of the bank had discovered that the bank had sustained losses of $12 million resulting from a trader in that department operating beyond his authority and without the bank's knowledge, and additional losses might be as high as $25 million. In addition, the Corporation requested the SEC to suspend trading in the company's securities. The SEC did so suspend trading, and that suspension is still in effect.

7. These announcements caused a dramatic decline in the ability of Franklin National Bank to borrow funds. A large run-off of borrowings and money-market instruments created a severe cash drain which the bank could meet only by massive borrowings from the Federal Reserve Bank of New York. In its press release of May 12, 1974, Franklin had announced that the Federal Reserve System was prepared to advance funds to Franklin as needed, within the limits of acceptable collateral. By May 22, 1974 -- just ten days after the Franklin announcement -- the Federal Reserve Bank loan had reached $1.125 billion. Franklin National Bank was unable to meet its need for cash by selling the bank's portfolio of securities because the market value of its portfolio had declined due to a general rise in interest rates and because many of the bank's securities were pledged to secure public deposits or trust department obligations.

8. On June 20, 1974, Franklin New York Corporation announced the bank's losses and restated its earnings for the first quarter of 1974 to show a net loss. Moreover, Franklin New York Corporation estimated that it would incur a substantial loss for the second quarter of 1974 and for the year 1974 as a whole.

9. From the middle of May until the end of September, I pursued various possible long-term solutions to the problems of Franklin National Bank. I assisted the bank in obtaining a new chief executive officer and a new foreign exchange officer. On May 13, 1974, I requested the member banks of the New York Clearing House Association to review the problems of Franklin National Bank. The purpose of this review was threefold:

(A) To advise me and my staff of the views of other bankers on the condition of Franklin National Bank;

(B) To establish a basis of information upon which the clearing house association members might act to help with Franklin's liquidity problems; and

(C) To provide information to members of the clearing house who might be interested in acquiring Franklin National Bank.

10. On June 11, 1974, with the encouragement of the Federal Reserve System, an arrangement was reached whereby members of the clearing house individually would lend federal funds to Franklin in an amount which aggregated $225 million. A security agreement was signed among Franklin, the Federal Reserve Bank of New York, and the participating clearing house banks under which the clearing

house banks, in the event of non-repayment of these federal funds by Franklin National Bank, could look to the assets already held by the Federal Reserve Bank of New York as security for its loan to Franklin. Under this agreement, the participating clearing house banks had a security interest in those assets prior to the interest of the Federal Reserve Bank of New York.

11. On July 22, 1974, a representative of my staff convened a meeting of representatives of more than two dozen of the largest banks in the United States, commencing what proved to be an unsuccessful effort to sell to them a $350 million portion of Franklin National Bank's considerable portfolio of Eurocurrency loans. If a sale could have been effected it would have infused a large amount of cash into Franklin National Bank and reduced reliance on the Federal Reserve Bank loan. Franklin was reluctant to consummate the sale, however, because the market value of the Eurocurrency loans was below their book value, and the sale would have required Franklin to realize an immediate capital loss. In addition, many of the potential buyers were reluctant to deal with Franklin National Bank without a guarantee against losses in these loans. For these reasons, the proposed sale of Eurocurrency loans never took place.

12. While I was attempting to restore confidence in Franklin National Bank and to stabilize its situation, I also believed that a prudent discharge of my statutory responsibilities required the development of a plan to protect the bank's uninsured depositors and other general creditors. In May and June 1974, I made inquiries of other banks which might be large enough and have enough management

resources to take over Franklin National Bank. None of these banks were interested in taking over Franklin without protection from undisclosed liabilities and other financial assistance from the FDIC.

13. On July 2, 1974, I wrote the FDIC requesting it to contact other banking organizations which were potential purchasers of some or all of the business and assets of Franklin National Bank. The FDIC developed a plan to assist a bank to assume liabilities and purchase assets of Franklin, and began negotiations with interested banks to draft a set of acquisition papers upon which banks could bid competitively. It was proposed that the FDIC, as receiver of Franklin National Bank, would transfer all of Franklin's deposits and certain other liabilities to an assuming bank, which would select assets of Franklin in an amount equal to the liabilities assumed, less the purchase price bid. The assuming bank would be required to keep most of Franklin's banking offices open for 30 days, and would have the right to select any of these offices permanently. In its corporate capacity the FDIC (1) would indemnify the assuming bank against losses from unassumed liabilities, (2) would purchase the remaining assets of Franklin, and (3) would assume Franklin's obligation to the Federal Reserve Bank of New York, which would be repaid to the extent possible out of the assets purchased by the FDIC, but would be fully repaid in any event at the end of three years whether or not sufficient collections had been made by that time.

14. On August 14, 1974, at my direction, a special examination of Franklin National Bank was begun. This examination revealed that Franklin National Bank's equity capital had been substantially impaired.

15. Based on all the facts available to me, including the bank's own estimate which conceded that the bank was heavily relying upon government assistance, I concluded that Franklin National Bank did not appear to be a viable institution. On October 4, 1974, I wrote to the Federal Reserve Bank, which was Franklin's major creditor, with a loan which, on October 2, 1974, amounted to approximately $1.768 billion. I briefly reviewed the situation, and asked for the Federal Reserve Bank's views with respect to its outstanding extension of credit to Franklin. On October 7, 1974, the Federal Reserve Bank replied, stating that its emergency credit assistance to Franklin was based on public policy considerations arising from the responsibility of the Federal Reserve System as a lender of last resort and was designed to give Franklin and the Federal banking regulatory agencies concerned a sufficient period to work out a permanent solution to the bank's difficulties. The Federal Reserve Bank believed that the plan developed by the FDIC, as described in Paragraph 13 of this Affidavit, offered a viable long-term solution to the problems of Franklin. In these circumstances, the Federal Reserve Bank advised me that it would not be in the public interest to continue its program of credit assistance to Franklin.

16. Based upon my examination of the bank's affairs, including the facts recited in this Affidavit, I became satisfied of the insolvency of Franklin National Bank, Brooklyn, New York. The Comptroller, as the official charged with the responsibility of determining insolvency and protecting the bank's depositors, is not required to wait until the losses he finds in the bank's assets are actually charged against the bank's book equity capital.

A computer could perform that function. The Comptroller's duty is to determine when a bank has reached the point whereby it will not be able to meet obligations to its depositors in the near future. The Federal Reserve Bank indicated that, in all of the circumstances, and with the FDIC plan available, it would not be in the public interest for the Federal Reserve Bank to continue its program of credit assistance to Franklin. It would have been impossible for Franklin National Bank to survive without such credit assistance. It was not in the best interests either of Franklin's depositors and other creditors or its shareholders to wait for further deterioration in the bank's condition, particularly when the alternative of an FDIC-assisted purchase of the bank, at a price including a substantial premium for going concern value, was available.

17. On October 8, 1974, at 3 p.m., having become satisfied that Franklin National Bank, Brooklyn, New York, was insolvent, and acting pursuant to 12 U.S.C. §§191 and 1821(c), I appointed the FDIC as receiver of Franklin National Bank and relinquished all authority over the affairs of the receivership, inasmuch as ". . . in the exercise of [its] rights, powers, and privileges [as receiver], the [FDIC is] not . . . subject to the direction or supervision of the . . . Comptroller of the Currency." 12 U.S.C. §1821(d).

18. At no time did I, or any employee of the Office of the Comptroller of the Currency take any part in the decision-making which may have resulted in discontinuing certain lines of credit to specific customers of the bank.

19. On October 8, 1974, this Court pursuant to 12 U.S.C. §198, approved the FDIC's plan for purchase and assumption of the assets and liabilities of Franklin National Bank by European American Bank.

20. I have never taken any action concerning Franklin National Bank except in pursuance of my official duties and in my capacity as Comptroller of the Currency. At all times mentioned herein, and in the complaint in Huntington Towers, Ltd., et al. v. Franklin National Bank, et al., U.S.D.C., E.D. N.Y., Civil Action No. 75 CIV 1934, my activities followed the procedures of the Office of the Comptroller of the Currency then in effect, and were done pursuant to the authority vested by law in the Office of the Comptroller of the Currency.

James E. Smith
JAMES E. SMITH
Comptroller of the Currency

SUBSCRIBED AND SWORN TO BEFORE ME, this 29th day of August, 1975.

Nancy V. Ellis
NOTARY PUBLIC

My Commission Expires: 7-31-76.

EXHIBIT B
AFFIDAVIT OF WILLIAM E. SIMON

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

HUNTINGTON TOWERS, LTD. and RICHARD CAREY, Plaintiffs,	)	
v.	)	Civil Action No. 75 CIV 1934
FRANKLIN NATIONAL BANK (in liquidation), FEDERAL DEPOSIT INSURANCE CORPORATION, FEDERAL RESERVE BANK OF NEW YORK, EUROPEAN AMERICAN BANK and JAMES E. SMITH, individually and as Comptroller of the Currency, Defendants.	)	

AFFIDAVIT

City of Washington)
District of Columbia) ss

I, WILLIAM E. SIMON, being duly sworn, depose and say as follows:

1. I am the duly appointed Secretary of the Treasury of the United States and I have served in that capacity since May 8, 1974. The Office of the Comptroller of the Currency of the United States is a bureau of the Treasury Department, and the Comptroller of the Currency is an official of the Treasury Department. 12 U.S.C. §1. I am familiar with the duties of the Comptroller of the Currency and his employees.

2. According to the records of this Department, James E. Smith, defendant in the case of Huntington Towers, et al. v. Franklin National Bank, et al., U.S.D.C., E.D. N.Y., Civil Action No. 75 CIV 1934, has served as Comptroller of the Currency since July 5, 1973.

3. Mr. Smith, as Comptroller of the Currency, was and is responsible for the regulation and the supervision of all national banks in the United States, including Franklin

National Bank, Brooklyn, New York. Mr. Smith as Comptroller of the Currency is also a director of the Federal Deposit Insurance Corporation, and as a director, is responsible in part for the FDIC's duty to regulate and supervise all federally issued banks throughout the United States.

4. I am familiar with the complaint filed in Civil Action No. 75 CIV 1934 above referred to and with the affidavit of Mr. Smith pertaining to his actions with respect to the matters alleged in the complaint. I affirm that the actions taken by Mr. Smith with respect to the matters shown in this affidavit and this complaint were taken in the course of his official duties as an officer of the United States.

William E. Simon
WILLIAM E. SIMON
Secretary of the Treasury

SUBSCRIBED AND SWORN TO BEFORE ME, this 4th day of September, 1975.

Alice L. Tamborlini
NOTARY PUBLIC

My Commission Expires:

My Commission Expires May 31, 1977

PLAINTIFFS' RULE 9(g) COUNTER STATEMENT TO JAMES SMITH

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

HUNTINGTON TOWERS, LTD., et ano., :

Plaintiffs, : 75 Civ. 972

-against- :

FRANKLIN NATIONAL BANK (In Liquidation), et al., :

Defendants. :

- x

Plaintiffs' Counter Statement
Pursuant To General Rule 9(g)
In Opposition To Defendant
Comptroller's (Smith) Motion
For Summary Judgment

1. Plaintiffs dispute paragraph 1 of defendants' Statement insofar as it suggests that the determination by the Comptroller as to the solvency of Franklin National Bank is binding upon this Court in respect of the issues in this action.

2. To the extent that paragraphs 2, 3, 4, and 5 of the defendants' Statement suggest that Franklin was not insolvent prior to October 8, 1974, the same is disputed. Plaintiffs refer to issues of fact posed by the complaint (i) that Franklin was insolvent, (ii) that defendants (including defendant Comptroller) knew it, (iii) that defendants (including defendant Comptroller) temporarily postponed the declaration of insolvency and the creation of a formal insolvent estate in accordance with law in order to accomplish distributions and the creation of lien security interests in violation of §§ 91 and 194 of the National Banking Act, (iv) defendants concealed Franklin's insolvency knowing that

innocent persons, such as plaintiffs, would rely on Franklin's appearance of solvency in doing business with Franklin.

3. Insofar as paragraph 5 of defendants' Statement suggests that the defendant Comptroller believed Franklin to be solvent and directed his efforts to solving its temporary liquidity problems, this is disputed; it being plaintiffs' contention that defendant Comptroller always knew that Franklin could not survive by itself and that its assets and business would have to be disposed of either in liquidation or in a transaction with other interests.

4. To the extent that paragraphs 6, 7, 8, and 9 suggest that defendant Comptroller did not know that Franklin's condition was one of insolvency prior to the dates therein set forth, the same is disputed.

Respectfully submitted,

SHEA GOULD CLIMENKO KRAMER & CASEY
Attorneys for Plaintiffs
330 Madison Avenue
New York, New York 10017
212/661-3200

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HUNTINGTON TOWERS, LTD., et ano.,	:	
Plaintiffs,	:	75 Civ. 972
-against-	:	
FRANKLIN NATIONAL BANK (In Liquidation), et al.,	:	
Defendants.	:	

Plaintiffs' Counter Statement
Pursuant to General Rule 9(g)
In Opposition To Defendant
European-American Bank's
Motion for Summary Judgment

1. As to paragraph 1 of said statement, plaintiffs assert that insofar as the contract was one concerning real property there was sufficient part performance thereof to take the case out of the statute of frauds. Plaintiffs dispute that the contract was one which either by its terms or in practical experience could not have been performed within one year.

2. Plaintiffs do not have a note or memorandum evidencing such contract and do not believe that one was or is required. Plaintiffs in good faith do not know whether there is a note or memorandum evidencing such contract since plaintiffs have been refused discovery of documents in defendants' possession. There is, however, one document--a check given by defendant for $100,000 --which plaintiffs do know of which evidences defendants' obligation in respect of the said construction loan.

3. Plaintiffs assert as facts that defendant European-

American Bank, by its agents, knowingly adopted and assumed the agreement of Franklin National to fulfill the construction financing agreement with plaintiffs, all as is more particularly set forth in certain affidavits of Richard Carey and Seymour Ikenson submitted in opposition to defendants' motion.

4. As to paragraphs 3 and 4 of defendants' statement, plaintiffs dispute that they are bound by agreements between defendant European-American and FDIC; and, in the absence of discovery with respect to the circumstances of the transaction between FDIC and defendant European-American, plaintiffs do not concede that European-American acquired assets for "value and in good faith" inasmuch as the said transaction in question appears to have been extremely economically favorable to defendant European-American.

Respectfully submitted,

SHEA GOULD CLIMENKO KRAMER & CASEY
Attorneys for Plaintiffs
330 Madison Avenue
New York, New York 10017
212/661-3200

AFFIDAVIT OF SEYMOUR IKENSON
IN OPPOSITION TO DEFENDANTS' MOTIONS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

HUNTINGTON TOWERS, LTD. and RICHARD CAREY,

Plaintiffs,

-against-

FRANKLIN NATIONAL BANK (in liquidation), et al,

Defendants.

----------X

Civil Action
No. 75 Civ. 972
(OGJ)

AFFIDAVIT

STATE OF NEW YORK)
:ss.:
COUNTY OF New York)

SEYMOUR IKENSON, being duly sworn, deposes and says:

1. I am the Secretary-Treasurer of Ikenson Iron Works, Inc., the subcontractor for the purpose of fabricating and erecting the steel framework of the building being constructed in 1974 by plaintiffs Richard Carey and Huntington Towers, Ltd. on Route 110 in Huntington, Long Island; I reside at 10 Welwyn Road, Great Neck, New York, and I submit this affidavit in opposition to the motion of defendant European-American Bank and Trust Company for summary judgment.

2. On or about October 15, 1974, I telephoned Mr. George Hill of defendant Federal Deposit Insurance Corporation, whom I understood to be in charge of the liquidation of Franklin National Bank, with regard to defendant European-American Bank & Trust Company's refusal to honor a check drawn by plaintiff Huntington Towers, Ltd. payable to Ikenson Iron Works for

$100,000. I had that check as well as another similar check for $80,000 which I had not yet deposited. I explained the matter to Mr. Hill.

3. In our conversation, Mr. Hill told me to call Mr. Klaus Jacobs of European-American.

4. I than called Mr. Jacobs that day and explained the matter and I believe I referred to my prior conversation with Mr. Hill. Mr. Jacobs said he would look into the matter.

5. In the afternoon of that day or the following day, Mr. Bradley of European-American called me, identified himself and asked that I appear with plaintiff Richard Carey at the Franklin Square office of European-American (formerly the offices of Franklin National Bank) at 9:30 A.M. on Friday, October 18, 1974, and the check would be honored. I agreed to be there and notified Mr. Carey.

6. Mr. Carey and I met at the Franklin Square office of European-American at approximately 9:30 A.M. October 18, 1974.

7. Shortly thereafter, Mr. Carey and I met in Mr. George Rilke's office with Mr. Rilke and Mr. Klaus Jacobs of European-American. I returned the Huntington Towers check which had been dishonored to Mr. Carey. Mr. Carey signed a document and gave it to Mr. Rilke. I was then presented with European-American's check payable to Ikenson Iron Works for $100,000, I endorsed it and returned it to the receptionist who had delivered it to me at the meeting and instructed her to deposit it to the Ikenson Iron Works account. She subsequently returned to deliver a deposit slip to me indicating that the $100,000 had been so deposited.

8. My best recollection of the conversation which then occurred is as follows. Mr. Jacobs said: "Are you happy now, Mr. Ikenson? We have given you the $100,000. We intend to finance construction of the job because we have a commitment to Long Island. You will have all of the same people here. Nothing will change." I responded that I was happy they had decided to finance the job and had committed themselves. Mr. Jacobs then excused himself because he had another meeting but, before leaving, stated he would like to meet and have lunch with me and other Long Island businessmen in the future. I said I would be happy to do so. Mr. Jacobs then left.

9. I then asked Mr. Rilke, who was aware that I had the other Huntington Towers check for $80,000 which I had not yet deposited, "How about honoring the other $80,000 today?" Mr. Rilke stated, "We will honor that money one day this coming week." I asked "When?" Mr. Rilke stated, "Call me Tuesday and I will tell you what day to come in." I said "No, I will call you on Monday at closing time at 3:00 O'clock." Mr. Rilke said "Okay."

10. When I called Mr. Rilke at 3:00 P.M. on Monday, October 21, I was told that he was not there. I was referred to a Mr. Balaban. Mr. Balaban refused to make the payment. Subsequently, I was referred to Mr. Hilb who refused to make the payment.

11. It was my understanding from what Mr. Jacobs had said on October 18, 1974 in the presence of Mr. Carey, Mr. Rilke and me, that a determination had been made to complete

the financing of the construction of the building and, therefore, I was being given the check for $100,000, representing part payment of amounts owed on construction of the framework. Pursuant to that understanding, I was assured of the payment of the additional $80,000 by Mr. Rilke.

12. In reliance in good faith upon that understanding, on Friday, October 18, 1974, I advised the erection subcontractor of Ikenson Iron Works to continue the erection project, a task which continued only for a short time due to European-American's subsequent refusal to pay.

Seymour Ikenson

Sworn to before me
this 2nd day of
January, 1976.

Anne D'Andrea

ANNE D'ANDREA
Notary Public, State of New York
No. 41-0953810 Queens County
Certificate filed in New York County
Term Expires March 30, 1976

AFFIDAVIT OF RICHARD CAREY
IN OPPOSITION TO DEFENDANTS' MOTIONS

JA 135

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

HUNTINGTON TOWERS, LTD. and RICHARD CAREY,

Plaintiffs,

-against-

FRANKLIN NATIONAL BANK (in liquidation), et al,

Defendants.

----------X

Civil Action
No. 75 Civ.972
(OGJ)

AFFIDAVIT

Supp Affid

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

RICHARD CAREY, being duly sworn, deposes and says:

1. I am a plaintiff in this action and the owner of all the outstanding shares of plaintiff Huntington Towers, Ltd. and I submit this affidavit in opposition to the motion for summary judgment made by defendant European-American Bank & Trust Company.

2. I have read the affidavit of Mr. Seymour Ikenson sworn to January 23, 1976.

3. I attended the meeting on October 18, 1974 with Mr. George Rilke, Mr. Ikenson and Mr. Klaus Jacobs at the Franklin Square office of European-American Bank & Trust Company to which Mr. Ikenson refers in his affidavit.

4. To my best recollection, Mr. Ikenson's account of the meeting is essentially correct and I, too, understood from the statements made at the meeting that the financing of the construction of the building would be completed. However, I would

like to add that although most of the conversation that took place at that meeting was between Mr. Ikenson, Mr. Klaus Jacobs and Mr. Rilke, Mr. Jacobs addressed himself to Mr. Ikenson and to me when he made the statement that he intended to continue to finance construction of the job and to honor his publicized commitment to Long Island. Mr. Jacobs also said to both of us, "What better proof of my sincerity could you ask for but that I have given you $100,000?" The document I signed and gave to Mr. Rilke, to which Mr. Ikenson refers, was a note for $100,000 payable to European-American Bank & Trust Company. I was sitting next to Mr. Rilke when he was queried by Mr. Ikenson as to whether the $80,000 check would be honored. My best recollection of his answer was that it would and he was sure it would be all right, that is, that it would be paid. I saw no reason to doubt this. The newspapers at the time were full of statements by the bank's management and the FDIC to the effect that they would honor all commitments to Long Island and that no customers or businessmen would be hurt. My building project was the only large office building construction project on Long Island at that time and I certainly thought that the decision to continue the financing was logical from all points of view and consistent with the publicized commitment of FDIC and European-American to Long Island.

5. Upon information and belief, Mr. Klaus Jacobs was Vice Chairman of European-American Bank & Trust Company on October 18, 1974. I understand from counsel that Mr. Jacobs is now the President of defendant European-American Bank & Trust Company.

6. I could have completed construction of the building within one year from that date. The steel framework of the building was 80% completed at the time Mr. Ikenson and I met with Mr. Jacobs and Mr. Rilke.

7. No terms of my agreement with Franklin National Bank have prevented completion of construction of the building in question within one year nor did Mr. Jacobs or Mr. Rilke impose any term upon me at the October 18, 1974 meeting which would have prevented the completion of that construction within one year.

8. I have read the affidavit of George Rilke dated September 8, 1975. I disagree with much that is said there and note that much is omitted, including my previous dealings with Franklin National Bank and Mr. Rilke with respect to the financing of this construction. I do agree, however, with Mr. Rilke's statement that "plaintiffs sought continued financing in October 1974 . . . . "for this construction. [Rilke affidavit, ¶4, emphasis added]

Richard Carey

Richard Carey

Sworn to before me
this 23rd day of
January, 1976.

Anne D'Andrea

ANNE D'ANDREA
Notary Public, State of New York
No. 41-0853810 Queens County
Certificate filed in New York County
Term Expires March 30, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

HUNTINGTON TOWERS, LTD. and RICHARD CAREY,

Plaintiffs,

-against-

FRANKLIN NATIONAL BANK (in liquidation), et al,

Defendants.

----------X

Civil Action
No. 75 Civ. 972
(OGJ)

SUPPLEMENTAL AFFIDAVIT

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

RICHARD CAREY, being duly sworn, deposes and says:

1. I am a plaintiff in the above-entitled action, and I am the President and sole stockholder of plaintiff Huntington Towers, Ltd., and I respectfully submit this Supplemental affidavit in addition to my affidavit sworn to on January 23, 1976 in opposition to the motion for summary judgment of defendant European-American Bank & Trust Company.

2. Upon again reviewing the Complaint, I note that the following allegation of Paragraph 13 is incorrect:

> "However, in or about September 1974, owing to its financial condition, Franklin National became unable to advance further funds for construction."

Although I believe that the last construction advance paid by Franklin National occurred in September 1974, Franklin, prior to the declaration of insolvency, never refused to honor any checks drawn by plaintiff Huntington Towers, pursuant to the construction loan agreement. Indeed, Mr. Rilke, on October 4, 1974,

while still an officer of Franklin and prior to the declaration of insolvency, okayed my issuance of the $100,000 check payable to Ikenson Iron Works, Inc. which was dishonored by European-American prior to my meeting of October 18, 1974 with Mr. Jacobs, Mr. Rilke and Mr. Ikenson.

3. Sometime in early November 1974, I was told by Mr. Seymour Ikenson that I should call Mr. George Hill of the FDIC immediately as Mr. Hill was waiting for my call. I called Mr. Hill, whom I understood to be FDIC's Chief Liquidator, and a meeting was arranged between myself, Mr. Hill and Mr. Davies of the FDIC. I attended this meeting prepared with all data of the job. I was told by Mr. Hill that "It is in our best interest to get this building built. We do not want to lose our money." There was no doubt in my mind, from that meeting, that the FDIC would continue to finance the entire construction. It was how they would do so, not if they would do so, which Mr. Hill, Mr. Davies and I discussed at that meeting. This also seemed consistent with their much publicized commitment to Long Island and it was the proper business decision.

4. On or about December 4, 1974, I received a phone call from Mr. George Hill saying he had received my hand delivered letter to him dated December 4, 1974, and a copy of a letter enclosed with it ~~[Exhibits A and B annexed hereto, respectively]~~ which was going out to all tenants of another building owned by Huntington Towers, Ltd. asking them to cooperate with the first mortgagee of that building on which a second mortgage had been given to Franklin on June 14, 1974. The first mortgagee had announced that it was foreclosing and I wished to notify my tenants promptly to effect necessary rent payments to the representative of the first mortgagee and try to assure that all

operated smoothly. Mr. Hill asked me not to send that letter out and not to cooperate with my first mortgagee, for he was going "to take [me] out of foreclosure."

5. Further, with respect to Paragraph 13 of the Complaint referred to in Paragraph 2 of this affidavit, I note that the Complaint alleges that "plaintiffs were required to draw upon other sources of funds as a temporary expediency while at the same time being reassured by Franklin National that the financing would be forthcoming from Franklin National." Again, this allegation is in error. Plaintiffs were indeed assured by Franklin of the continuation of the loan, but plaintiffs were not required to draw upon other sources until Franklin was placed in the hands of FDIC. Plaintiffs then did find it necessary to draw as best they could upon other sources and did so in reliance upon FDIC's assurance that the financing would be forthcoming. RC RC

Richard Carey.

Sworn to before me
this 29 day of
January, 1976.

Ralph I. Bell

RALPH I. BELL, Notary Public
State of New York, No. 31-4520757
Qualified in New York County
Certificate filed in New York County
Commission Expires March 30, 1976

 JA 141

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

HUNTINGTON TOWERS, LTD., et ano.,

Plaintiffs,

-against-

FRANKLIN NATIONAL BANK (In Liquidation), et al.,

Defendants.

- x

75 Civ. 972

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

SHELDON D. CAMHY, being duly sworn, deposes and says:

1. I make this affidavit in opposition to the motion of defendant Smith (individually and as Comptroller of the Currency) for summary judgment dismissing the complaint herein. The critical allegations of the complaint as against said defendant are the following:

(a) That Franklin was insolvent months prior to the official declaration of its insolvency;

(b) That defendants, Comptroller, New York Reserve Bank and FDIC, knew that it was insolvent;

(c) That the three defendants determined not to reveal its insolvency but instead to delay the announcement of its insolvency and the creation of the insolvent estate;

(d) That during the period of delay and pursuant to the plan, defendant New York Reserve Bank provided funds to maintain the appearance of solvency

and that to the knowledge of defendants these funds were used to pay certain unsecured creditors and uninsured depositors in full and replace same with New York Reserve Bank holding a lien for full security;

(e) That as a result of the foregoing plan, the assets available to general creditors, such as plaintiffs, were reduced or completely eliminated, thereby causing plaintiffs, general creditors, very substantial injury.

As against the Comptroller because of sovereign immunity invoked, plaintiffs' relief is limited to declaratory and injunctive relief in voiding the preferential liens and directing distribution of assets ratably by the Comptroller in accordance with 12 U.S.C. § 194.

2. The affidavit of James Smith, Comptroller, in support of motion for summary judgment does not specifically deny any of the foregoing allegations. Instead, the statement contains a narrative of certain events relating to Franklin's condition between approximately May 1974 and October 8, 1974 when he formally declared the Bank insolvent without ever pinpointing the date when he first knew the Bank to be insolvent. Moreover, his affidavit appears to carefully avoid any objective definition of insolvency.

3. At one point in his affidavit, the Comptroller does state (Par. 16):

> "The Comptroller, as the official charged with the responsibility of determining insolvency and protecting the bank's depositors, is not required to wait until the losses he finds in the bank's assets are actually charged against the bank's book

> equity capital. A computer could perform that function. The Comptroller's duty is to determine when a bank has reached the point whereby it will not be able to meet obligations to its depositors in the near future."

4. Applying the above test, information has become available, portions of which strongly support the inference that the defendants knew that Franklin was insolvent months prior to the Comptroller's official declaration of its insolvency. This information is contained in various Reports, testimony and correspondence contained in the Record of Hearings before the House Banking Committee on H.R. 8024. A schedule of these materials is annexed hereto as Exhibit A and the Court is respectfully referred thereto for the full context of the matters to which I refer in this affidavit.

5. In a statement given to the House Committee on Banking, dated July 17, 1975, set forth at pages 876, 907 of Part 2 of the Hearings of the said Subcommittee, the Comptroller described the events in May 1974 as follows:

> "As confidence in Franklin declined, the bank was literally frozen out of all sources of short term funds. To a bank such as Franklin, which depended so heavily on purchased funds, this situation meant <u>certain death</u>.
>
> "In a normal money market environment, Franklin might have been saved. But given the highly selective character of this market, <u>there was no hope</u>."

6. The problem of high short term interest rates went beyond questions of Franklin's temporary liquidity and to the very value of the Bank's asset portfolio which contained loans placed at lower rates. As the Comptroller stated in his affidavit in this action (Par. 7), ". . . the market value of its portfolio had declined due to a general rise in interest rates." Thus, the

net worth of Franklin's assets had been heavily impaired by the very circumstances which gave it "no hope" of finding solutions to its liquidity problems. Moreover, as the Comptroller admits (affid. par. 4), the examination preceding May of 1974 showed that questionable assets in Franklin's portfolio substantially exceeded (162%) its capital. Thus, applying a reasonable reserve for its questioned assets and a fair discount to its receivables for the change in interest rate, there was every reason to believe that Franklin's liabilities substantially exceeded its assets at fair valuation--the net worth test of insolvency--and that the parties knew this in May 1974. As to the liquidity test, the Comptroller is clear--the situation was "hopeless."

7. Notwithstanding the situation with which the defendants were confronted in May and early June, they delayed announcement of Franklin's condition in order to "gain time" while attempts were made by defendants to find a merger or acquisition partner for Franklin (Hearings, pp. 1885, 1887). During this period, the New York Reserve Bank pumped over a billion dollars worth of fully secured loans into Franklin which money, to the knowledge of defendants, went out to Franklin's uninsured depositors and unsecured general creditors. Chief among these were other banks and corporate lenders who had advantage of the high interest rates that Franklin was paying and to European financial houses to whom Franklin was indebted on unsuccessful foreign exchange transactions (Hearings, pp. 1832, 2056). By these means, over a billion dollars was paid in full to general creditors out of the assets of an insolvent bank while plaintiffs, small local creditors, were not even told of the insolvency and are now left with only a ratable share of the assets

remaining after the lien priorty to New York Reserve Bank which defendant FDIC has chosen to honor.

8. As appears from the statement of Frank Wille set forth in the Hearings (at page 1038):

> "In these first two months of Franklin's public ordeal, it was agreed between the Comptroller of the Currency, the Federal Reserve System and the FDIC, that the FDIC should stay very much in the background and avoid public identification with efforts to find a solution for FNB's problems. The concern at the time was, of course, that public disclosure of FDIC's interest in the outcome of the Franklin National Bank situation would lead to a general conclusion that FNB's failure was likely, if not imminent."

However, it is clear that notwithstanding its position in the "background" of the affairs of Franklin as far as the public was concerned, the FDIC was a full participant with the Reserve Bank and the Comptroller in the surveillance and management of the Franklin's affairs.

9. As appears from Mr. Wille's statement and the statement of the Comptroller in the report referred to above, on July 2, 1974 the Comptroller "sadly" wrote to the FDIC formally directing that it make plans for an FDIC "assisted take over" (Hearings, pp. 911, 1054). Under the law such an "assisted take over" is possible only in the case of an insolvent bank. I respectfully suggest to Your Honor that the nature of the conduct of business is such that if the Comptroller wrote formally on July 2, 1974 that plans for an "assisted take over" be made, there is a fair basis for an inference that a conclusion of insolvency had actually been reached by the parties before that time. Even if the July 2nd date is accepted, the affidavits indicate that over three hundred million dollars worth of additional fully secured loans were pumped in by New York Reserve Bank after

July 2, 1974 for the very purpose of paying general creditors as set forth above.

10. As the statement of the Federal Reserve (Hearings pp. 799-801) makes clear, the "sheer size" of the fully secured discount window loans provided by the Federal Reserve and Franklin between May and October 1974 was unprecedented and "extraordinary." These had been arranged by the Comptroller not for the purpose of providing some temporary liquidity for an operating bank. Moreover, the reason for these loans (accepting defendants' statements at face value) had nothing to do with preserving the assets of Franklin for creditors.

> "The primary purpose of these loans to Franklin was to prevent the immediate or imminent closing of that institution because of its liquidity problems. We believed that the closing of a $5 billion bank such as Franklin could have precipitated other bank failures with resulting large losses for many individuals and businessmen and for the Federal Deposit Insurance Corporation. This situation arose during a difficult period for financial institutions and financial markets; such a failure at that time could, in our judgment, have had serious adverse consequences for the stability of our nation's banking system, and for domestic and international financial markets in general.
>
> "With these considerations in mind, Federal Reserve credit, fully secured by Franklin National Bank collateral, was extended to Franklin to help offset the massive net withdrawals of funds that developed as that bank's difficulties became generally known. Between May 8 and October 8, 1974, when the bank was declared insolvent, it suffered an outflow of funds amounting to $2.8 billion -- over half its total footings. By strenuous efforts, the bank succeeded in reducing its loans, investments and cash by $1.1 billion during this interval. The eventual $1.7 billion in Federal Reserve credit assistance was necessary to offset the balance of the outflow."

It appears that substantially all of Franklin's assets having a pledgeable value were made the subject of a first lien to the Federal Reserve and the same totalled 1.7 billion dollars. I

respectfully submit that the provisions of law authorizing the Reserve to make temporary window loans to ease liquidity problems for member banks were never intended to be used for the purpose of replacing over a billion dollars worth of general creditors of an insolvent bank with a preferred Federal Reserve Bank lien. The inference is inescapable that these actions were taken to pay off other American and European banks in full on loans made by them to Franklin, which, if paid ratably and over time to an insolvency, would have had embarrassing and disastrous repercussions to the member banks of New York Reserve Bank, their corporate clients and European correspondents (See Hearings, p. 1832, and discussion of London Branch at p. 2056 and settlement of foreign exchange contracts at pp. 1066-70).

11. Ultimately, when the Franklin was closed, FDIC took control of its assets, arranged the transaction with European-American in which European-American was given first choice among assets and FDIC then held the rest of the assets for liquidation under a plan under which Federal Reserve pursuant to its lien would have recognized priority of payment plus a guarantee from FDIC (qua corporation) that any shortage of assets for payment of its loans would be made good by the FDIC.

12. As the matter now stands, plaintiffs are advised that the assets will not be sufficient to make any meaningful sum available to plaintiffs as general creditors after the Reserve's priority has been honored.

13. If Franklin had been declared insolvent several months earlier, hundreds of millions and perhaps even a billion dollars worth of assets upon which Federal Reserve has a first

lien would have been available for plaintiffs to participate in. Even the Chairman of the House Banking Subcommittee questioned whether there was any difference in the condition of Franklin in October as against May other than that 1.B million of unsecured creditors were replaced by New York Reserve as secured creditor (Hearings, p. 1969). The Comptroller's answer was that there was no difference except that the intervening time had been used to try to solve the problem (Hearings, p. 969).

14. I submit that the evidence supports the allegation that the activities of the defendants (including defendant Comptroller) between May and October were not devoted to preserving the solvency of the Franklin, but instead were devoted to "putting together a deal" (Hearings, p. 910), either privately through Mr. Smith's trusted friend, Mr. David Kennedy (former Secretary of the Treasury, who apparently held voting power over Franklin's stock) (Hearings, pp. 872, 910), or on an FDIC assisted basis (Hearings, p. 911), in which the assets and business of the insolvent Franklin would be absorbed by other interests.

> "[Mr. St Germain.] . . . For instance, in Franklin National, it was the Comptroller who made the decision unilaterally that Franklin had failed and that time had come to find another institution within which to merge Franklin. Am I incorrect in that?
>
> "[Chairman Wille.] Well, he did attempt to work out a merger without FDIC assistance, prior to July of last year. On July 2, he wrote us and said that his efforts had been unsuccessful, and would we please now enter the picture as an active participant in the negotiations for a resolution of the Franklin problem, which we did.
>
> * * *
>
> " . . . [B]y the time Franklin Bank was known to everybody to be a problem, it was in many respects already too late to perform a rescue operation in the sense that you could correct the bank's situation and keep it going as an independent institution without a merger or some kind of an acquisition of some kind. (Hearings, pp. 1215, 1216).

* * *

> "Now, we cannot under most circumstances advertise that on a certain day x bank is going to fail, and we should like to have people ready to put in bids on a uniform basis. We just cannot do that, and, in fact, even in the negotiations, both in San Diego and in New York, the actual date when the Comptroller might move was probably the most carefully preserved secret in both negotiations, and was only determined by him after he felt all of the preparatory steps had been taken. So, even there, we were doing our best to maintain some cloak of secrecy over our actual negotiations and discussions in order not to have even more traumatic impact upon public confidence in banks in those two States." (Testimony, Chairman Wille, Hearings, p. 1225) (Emphasis added.)

It is also clear from Chairman Wille's testimony that the timing of the Comptroller's formal determination of insolvency was not geared to when first he found the Bank to be insolvent, but, rather, to when he was satisfied that all preparatory steps to a pre-arranged disposition of its assets had been made.

15. The statements of certain of the defendants to the Congress on the question of "solvency" should be of interest to this Court. Chairman Wille, speaking for FDIC, made the remarkable statement that the Franklin could be regarded "solvent" as long as defendant FDIC was willing to lend the money (Hearings, p. 1186). The Federal Reserve expressed the view that it was authorized to lend money as long as the Comptroller of the Currency had not declared the Bank insolvent (Hearings, pp. 1880-1882). The Comptroller's affidavit provides underlying facts showing insolvency, but does not deal with the issue of whether the Bank was solvent prior to October 8, 1974. It states only that on October 8, 1974, being officially "satisfied" of its insolvency, he declared it insolvent and placed it in receivership. I respectfully submit that under the sections of the National Banking Act (12 U.S.C. §§ 91 and 194) requiring ratable distribu-

tion of assets of insolvent banks by the Comptroller and declaring null and void transactions designed to distribute assets in a manner contrary to the Act, a more meaningful and objective test of solvency must be used if creditors are to receive any protection at all.

16. Under the facts of this case we submit there is evidence to support plaintiffs' contention that applying a minimal objective standard Franklin was insolvent for a period substantially prior to October 8, 1974, that all of the defendants knew it, and that the transfers of security permitted by them to New York Reserve Bank were made from what was in effect an insolvent estate or clearly that such transfers were in "contemplation of insolvency" and to prevent application of its assets in accordance with law, as used in § 91.

17. In their presentation to Congress, the defendants pointed out that the device used by them in the case of the Franklin insolvency worked out happily in that all creditors and uninsured depositors were paid in full. (See, e.g., Hearings, p. 1887). But plaintiffs did not receive payment in full. Plaintiffs face the task of proving their case against Franklin in liquidation and then having no assets from which to collect. In one sense, defendants' statement has a validity in that if defendants were to engage in a plan of the type referred to above, they owed it to all interested parties, including the plaintiffs, to see to it that no innocent person was injured by their plan.

18. If one accepts the declared motivations of these defendants, it is clear that the use of Federal Reserve secured loans to keep Franklin open was principally designed to protect other banks. Thus, defendants appear to have given primacy to almost every consideration, except the one which should have been

paramount in protecting creditors -- to prevent members of the public from having continued dealings with an insolvent bank. In these circumstances, it is, I submit, incumbent on this Court to determine questions of Franklin's solvency and the validity of transfers or liens under 12 U.S.C. §§91 and/94 wholly independent of the date the Comptroller officially declared Franklin to be insolvent.

19. It is respectfully pointed out that all of the statements of defendants referred to herein, either before this Court or in the Committee hearings, are self-serving statements by the defendants. These statements are offered by plaintiffs to show that even in such self-serving statements lie facts supporting plaintiffs' case. We respectfully submit that on a motion of this type the Court should not resolve contested issues on the statement of one of the parties even if it is a government official. Plaintiffs earnestly request an opportunity to develop the facts in adversary proceeding.

WHEREFORE, it is respectfully requested that the Court deny the motions.

Sheldon D. Camhy

Sworn to before me this
2nd day of February, 1976.

Anne D'Andrea

ANNE D'ANDREA
Notary Public, State of New York
No. 41-5[illegible] Queens County
Certificate filed in [illegible] County
Term Expires March 30, 1977

EXHIBIT TO AFFIDAVIT OF SHELDON CAMHY **JA 152**

LIST OF MATERIALS
RE FRANKLIN NATIONAL BANK
CONTAINED IN REPORT OF HOUSE BANKING
COMMITTEE HEARINGS ON HR 8024

1. Statement of James Smith, Comptroller of Currency - July 17, 1975; Hearings on HR 8024, Part 2, pp. 876, 900-932.

2. The FDIC and Franklin National Bank - a Report to The Congress by Frank Wille, Chairman, FDIC; November 23, 1974; Hearings on HR 8024, Part 2, pp. 1038-1089.

3. FDIC News Release 2/25/75; Hearings on HR 8024, Part 2, pp. 1090-1098.

4. Testimony of Frank Wille, Chairman, FDIC; Hearings on HR 8024, pp. 1183-1188; pp. 1209-1238.

5. Testimony of James Smith, Comptroller of Currency; Hearings on HR 8024, Part 2, pp. 862-875.

6. Letter of Chairman, House Committee to Arthur P. Burns, Aug. 6, 1975, Hearings on HR 8024, Part 3; pp. 1828-1833.
   Answer of Fed. Reserve to said letter, Hearings on HR 8024, Part 3, pp. 1879-1924.

7. Letter of Chairman, House Committee to James E. Smith, Comptroller, Aug. 11, 1975 - Hearings on HR 8024, Part 3, pp. 1953-1958.
   Answer of James E. Smith, Comptroller, Sept. 16, 1975, Hearings on HR 8024, Part 3, pp. 1961-1978.

8. Letter of Chairman, House Committee to Frank R. Wille, Chairman, FDIC, August 13, 1975, Hearings on HR 8024, Part 3, pp. 2045-2050.
   Answer of Frank R. Wille, Sept. 3, 1975; Hearings on HR 8024 pp. 2051-2070.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

HUNTINGTON TOWERS, LTD., et ano.,

Plaintiffs,

-against-

FRANKLIN NATIONAL BANK (In Liquidation), et al.,

Defendants.

- x

75 Civ. 972

SUPPLEMENTAL AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JAMES D. PORTER, JR., being duly sworn, deposes and says:

1. I am a member of SHEA GOULD CLIMENKO KRAMER & CASEY, Attorneys for plaintiffs RICHARD CAREY and HUNTINGTON TOWERS, LTD. in this action, and I respectfully submit this Supplemental Affidavit in opposition to the motion for summary judgment of defendant European-American Bank & Trust Company, in order to call to the attention of the Court a document which was recently produced by defendant F.D.I.C. in response to a Freedom of Information Act request from Donald Shiel, Esq., counsel to Mr. Carey and Huntington Towers, Ltd. and called to my attention. A copy of that document is annexed hereto as Exhibit A.

2. On information and belief, Exhibit A is a copy of a funding request dated October 17, 1974 nine days after Franklin National Bank was declared insolvent and its commercial banking operations were assumed by defendant European-American Bank & Trust Company on its own behalf and as agent of F.D.I.C., receiver of Franklin.

3. I am advised that all written notations borne by Exhibit A were on the document produced by F.D.I.C. with the exception of the brackets around one sentence added by our client for emphasis.

4. On information and belief, such funding request, though written on Franklin National Bank interoffice stationery, was in fact written by Mr. George Rilke as a Vice President of European-American to Mr. C. D. Stephenson as Senior Vice President of the Real Estate Banking Department of European-American, both men having assumed their respective positions at European-American when Franklin's commercial banking business was taken over nine days earlier.

5. On information and belief, this funding request was signed by Mr. George Rilke and approved by Mr. C. D. Stephenson, as indicated by the signatures of both gentlemen, Mr. Stephenson's signature being prefaced by the word "Agree."

6. I respectfully submit that this funding request, dated one day prior to the meeting of October 18, 1974 between Messrs. Jacobs and Rilke of European-American and plaintiff Carey and his subcontractor, Mr. Ikenson, described in the Carey and Ikenson affidavits previously submitted to this Court (the meeting at which the additional advance of $100,000 was made by European-American), makes clear the fact that said meeting and advance took place with reference to and as part of the loan by which the continuing construction of plaintiffs' office building had been funded and was to be funded.

SUPPLEMENTAL AFFIDAVIT OF JAMES PORTER JA 155
IN OPPOSITION TO DEFENDANTS' MOTIONS

7. It appears from Exhibit A that European-American on October 17, 1974 was well aware of the importance of continuing the construction of plaintiffs' building, of the urgency of Mr. Carey's then current need for $500,000 and of the history of the loan, and that the Senior Vice President of the Bank's Real Estate Banking Department approved a Vice President's funding request relating to the funding of the construction which had been previously carried on by Franklin.

WHEREFORE, I respectfully request that European-American's motion be denied.

James D. Porter, Jr.

Sworn to before me this
13 day of April, 1976.

RALPH I. BEIL, Notary Public
State of New York, No. 31-4520767
Qualified in New York County
Certificate filed in New York County
Commission Expires March 30, 19 77

EXHIBIT TO AFFIDAVIT OF JAMES PORTER JA 156

FRANKLIN NATIONAL BANK

INTEROFFICE LETTER

To:	From:	Date:
C. D. Stephenson Senior Vice President R/E Banking Dept. (2761)	George Rilke Vice President R/E Banking Dept. (2761)	10/17/74

Subject: FUNDING REQUEST - HUNTINGTON TOWERS, LTD.

Mr. Richard Carey has been a depositor of Franklin National Bank since at least 1963. He has built numerous 2-family house jobs in Queens and, over the last few years, became engaged in the development of office buildings. He successfully completed a 50,000 sq. ft. building in Roslyn which is 100% rented and a 125,000 sq. ft. office building on Route 110 and the L. I. Expressway which is considered by many to be the best location in the area. This building has current rentals of about 70,000 to 75,000 sq. ft. and is complete with the exception of tenant work on unrented space. Financing is from HNC Realty Investors for $3,250M with a provision to increase by $400M to $3,650M after a rent roll of $616M is achieved. According to Mr. Carey, this is now the case and his attorney is reviewing the papers to determine whether HNC would be required to fund at this time. In discussions with mortgage brokers they are of the opinion that a first mortgage of between $4,250M to $4,500M is obtainable when money market conditions improve, dependent upon the rates. We currently hold a DPC second mortgage on this property in the amount of $1,300M.

In addition to the above Huntington building, he has under construction an office building of approximately 142,000 sq. ft. immediately adjacent to the completed structure. Marine Midland Bank is 99% sure that they will rent the building for their regional office. Occupancy is expected in January 1976. A final decision is anticipated next week. If they do not take the entire building, it will probably be around 100,000 sq. ft. They have inspected the plans and work completed on the building since they had some changes in mind. Drawings were given to Mr. Carey along with a list of recommended changes and he feels there are no problems on the items. The steel structure is almost completed and the steel decking is on the job site. Enclosed is a copy of Mr. Carey's letter indicating his concern and requirements of $500M. We currently hold a first mortgage of $700M on this property plus a DPC second of $145M. It has been our understanding that ultimately the loan would be converted to a formal construction loan for overall protection of the advances made.

We are currently owed $2,554M by Huntington Towers, Ltd. As collateral we have a $700M first mortgage on the land where the new building is under construction plus a DPC mortgage of $145M. As previously mentioned, we hold a DPC second of $1,300M on the completed building. In addition, we have mortgages totaling $650M on the Roslyn office building as additional security taken under an abundance of caution. Saul Weinberger had agreed to purchase this property for $550M which would reduce the loans of Mr. Carey. This, of course, is now held up.

Meanwhile, it is important to provide funds to enable the continuance of the construction project which should enhance the overall situation. This is now one of the major projects on Long Island and is quite important to the real estate industry.

GR:mm
Enclosure

LETTER OF PHILIP HOWARD IN SUPPORT OF EUROPEAN-AMERICAN'S MOTION TO DISMISS

JA 157

NEW YORK TELEPHONE: (212) 952-6100
TELEX: 62604 (INTERNATIONAL) 127816 (DOMESTIC)
CABLE ADDRESS: LADYCOURT, NEW YORK

48 Wall Street, New York 10005

250 PARK AVENUE, NEW YORK 10017
17, AVENUE MATIGNON, 75008 PARIS
21 IRONMONGER LANE, LONDON EC2V 8JB

April 16, 1976

Honorable Orrin G. Judd,
United States District Court for
the Eastern District of New York,
225 Cadman Plaza East,
Brooklyn, New York.

Re: Huntington Towers Ltd., et ano v.
Franklin National Bank, et al.,
75 Civ. 972

Dear Judge Judd:

Plaintiffs in this action have submitted a supplemental affidavit in opposition to the motion to dismiss or for summary judgment by our client, European-American Bank and Trust Company. The supplemental affidavit and attached document do not in any way contradict European-American's arguments that there is no contract; the document certainly does not satisfy the statute of frauds.

The document, which plaintiffs recently obtained from the FDIC under the Freedom of Information Act, is an internal memorandum written immediately after European-American had assumed certain of Franklin's assets, and provides a short analysis of plaintiffs' then financial situation. The memorandum merely corroborates European-American's motion papers, which suggest that the purpose of the 30-day, $100,000 note provided by European-American to plaintiffs one day later was to ward off hungry creditors

so that European-American and the FDIC could have time to make a reasoned decision on this troubled property. Thus, two European-American officers considered that, in order "to enable the continuance of the construction project," in the "meanwhile," "it is important to provide funds."

It proved to be an expensive "continuance" for European-American, as plaintiffs have made no effort to repay the note. Plaintiffs and their creditors, on the other hand, benefited from the delay both financially and by the fair consideration given their project.

With respect to the requirements of the statute of frauds, the memorandum does not evidence a contract to provide any financing, short-term or otherwise. It certainly does not constitute a note or memorandum giving the terms of such a contract. The memorandum is but an internal statement by one employee of European-American to his immediate superior, and a notation of the latter's views. It was not adopted by the Bank or communicated to the plaintiff.

The supplemental affidavit and attached document do not in any respect negate the arguments presented by European-American in support of its motion to dismiss or for summary judgment.

Respectfully yours,

Philip K. Howard

cc: All Counsel

MEMORANDUM AND ORDER OF JUDD, J.

JA 15[illegible]
FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
★
JUL 1 1976
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

HUNTINGTON TOWERS, LTD. and
RICHARD CAREY,

Plaintiffs,

- against -

FRANKLIN NATIONAL BANK (in liquidation),
FEDERAL DEPOSIT INSURANCE CORPORATION,
FEDERAL RESERVE BANK OF NEW YORK,
EUROPEAN-AMERICAN BANK and JAMES SMITH,
individually and as Comptroller of the
Currency,

Defendants.

----------x

75-C-972

July 1, 1976

Appearances:

SHEA GOULD CLIMENKO KRAMER & CASEY, ESQS.
Attorneys for Plaintiffs

By: SHELDON V. CAMHY, ESQ.
JAMES D. PORTER, JR., ESQ.
DEAN G. YUZEK, ESQ.
of Counsel

HUGHES HUBBARD & REED, ESQS.
Attorneys for Defendants Franklin National
Bank (in liquidation) and Federal Deposit
Insurance Corporation

By: POWELL PIERPOINT, ESQ.
AMALYA L. KEARSE, ESQ.
NORMAN C. KLEINBERG, ESQ.
SUSAN L. THORNER, ESQ.
of Counsel

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Appearances (continued):

CAHILL GORDON & REINDEL, ESQS.
Attorneys for Defendant Federal Reserve
Bank of New York

By: WILLIAM E. HEGARTY, ESQ.
ALLEN S. JOSLYN, ESQ.
MICHAEL P. TIERNEY, ESQ.
of Counsel

SULLIVAN & CROMWELL, ESQS.
Attorneys for Defendant European-American Bank
& Trust Company

By: JOHN L. WARDEN, ESQ
PHILIP K. HOWARD, ESQ.

HON. DAVID G. TRAGER
United States Attorney
and
REX E. LEE, ESQ.
Assistant Attorney General
Department of Justice
Attorneys for Defendant James E. Smith

By: HENRY A. BRACHTL, ESQ.
Assistant U. S. Attorney
of Counsel

J U D D, J.

MEMORANDUM AND ORDER

The Motions

In this $8 million action by a borrower from the now insolvent Franklin National Bank (Franklin), each of the five named defendants has moved to dismiss the complaint:

1. Federal Deposit Insurance Corporation as

Receiver of Franklin National Bank (in liquidation), (Receiver), moves for dismissal under F.R.Civ.P. § 12(b)(6) for failure to state a claim on which relief may be granted.

2. Federal Deposit Insurance Corporation, in its corporate capacity (FDIC), moves to dismiss for lack of subject matter jurisdiction under F.R.Civ.P. 12(b)(1) and also for failure to state a claim under F.R.Civ.P. 12(b)(6).

3. Federal Reserve Bank of New York (FRB) moves to dismiss for failure to state a claim under Rule 12(b)(1) and lack of subject matter jurisdiction under Rule 12(b)(6).

4. European-American Bank & Trust Company (EAB), sued as European-American Bank, moves to dismiss under Rule 12(b)(6) or for summary judgment under F.R.Civ.P. 56. It also moves to stay discovery until the final disposition of the motions.

5. Defendant James E. Smith, individually and as Comptroller of the Currency (the Comptroller) moves to dismiss for lack of subject matter jurisdiction or in the alternative for summary judgment.

The Complaint

Jurisdiction is invoked under the federal question category, 28 U.S.C. § 1331. The presence of FDIC as a defendant also gives independent jurisdiction under 12 U.S.C. § 1819, Fourth.

Plaintiff Huntington Towers, Ltd. (Huntington) is a New York corporation, owned by plaintiff Carey, and engaged in real estate development on Long Island. Franklin National Bank (Franklin) agreed in November 1973 to advance sums necessary up to a total of $5 million to construct a building on a parcel of land owned by Huntington. Financing was conditioned on plaintiffs' obtaining a permanent mortgage commitment. The commitment was obtained, construction was begun, and a major tenant was secured, and substantial funds were advanced. On or about June 14, 1974, at Franklin's request, plaintiffs pledged real estate mortgages worth over $3 million as additional security for monies advanced and to be advanced under the November 1973 agreement.

Meanwhile, Franklin is alleged to have become insolvent on or about May 1, 1974 and defendants Franklin, FDIC, FRB, and the Comptroller are charged with jointly concealing the insolvency for several months so that Franklin could continue in operation. As part of this plan, the complaint charges that FRB made substantial advances to maintain Franklin's liquidity and permit uninsured depositors and general creditors to withdraw their funds from Franklin. As security for the advances, FRB was given liens on substantial portions of Franklin's assets. Franklin, FDIC, FRB, and the

Comptroller are also alleged to have known that Franklin, although insolvent, was continuing to conduct its banking business, and that customers were relying on its ability to perform its banking functions.

On October 8, 1974 the Comptroller declared Franklin insolvent and appointed FDIC as Receiver. Under an agreement of the same date, the Receiver turned over to EAB substantial blocks of Franklin's assets. EAB thereafter succeeded to the operation of Franklin's business and conducted business with Franklin's customers. The complaint alleges that representatives of Franklin, FDIC, and EAB assured plaintiffs that financing of its construction would continue, but that further financing was not provided. Having pledged mortgages as security for future advances in reliance on Franklin's appearance of solvency, plaintiffs have been unable to complete the building. They have gone into default with contractors and materialmen and face loss of their properties by foreclosure. Damages are claimed of approximately $8 million.

The second claim in the complaint is based on assertions that FRB knew of Franklin's insolvency at the time it acquired liens on Franklin's assets, that there will be few or no assets available for Franklin's general creditors, and that Franklin, FDIC, FRB, and the Comptroller deliberately

concealed Franklin's insolvency. As a result, the grants of security to FRB are alleged to be null and void under 12 U.S.C. § 91, and to constitute "a fraud on the general creditors of Franklin." Plaintiffs seek a declaratory judgment that FRB is not entitled to any security interest or preference as against them in respect of assets of Franklin. Plaintiffs also seek an injunction against FDIC's recognition of any such security interest.

Other Facts

The Comptroller's affidavit in support of his motion for summary judgment sets forth that as of December 31, 1973 Franklin was the twentieth largest bank in the United States, with $5 billion of resources, $3.7 billion of total deposits, and 103 branches in addition to its main office. The stock of its holding company, Franklin New York Corporation (FNYC), was publicly owned, and registered with the Securities & Exchange Commission. A regular examination of Franklin by the Comptroller, begun on November 14, 1973 and concluded on March 8, 1974, showed that Franklin's total resources had grown much faster than its capital; that its growth had been financed almost entirely by short-term borrowed funds representing about 50 percent of the bank's liabilities; and that it had loans which were subject to criticism, although not necessarily uncollectible, amounting

to more than its equity capital of $170 million.

During the week of May 6, 1974, the Comptroller's Office and the Federal Reserve System learned from Franklin that severe losses had occurred in its foreign exchange department, that announcement of these losses would cause a severe liquidity crisis, and that an immediate and massive loan from FRB might be necessary. On May 12, 1974, FNYC Franklin's parent corporation, announced that the foreign exchange department of Franklin had sustained losses of $12 million and that additional losses might be as high as $25 million. Trading in securities of FNYC was promptly suspended. These announcements caused a large run-off of borrowings, in spite of the announcement that the Federal Reserve System would advance funds to Franklin as needed, within the limits of acceptable collateral. Within ten days (by May 22, 1974), the loans from FRB reached an amount of $1.125 billion.

Between May and October, the Comptroller's Office endeavored to develop long-term solutions to Franklin's problems, including efforts to obtain help from other banks with its liquidity problems, to arrange a purchase of Franklin by some other bank, and to negotiate with FDIC to assist a purchase and assumption of Franklin's assets and liabilities by another commercial bank. A substantial

impairment of the bank's equity capital was revealed by a special examination begun on August 14, 1974. By October 7, 1974, FRB informed the Comptroller that continuation of its credit assistance to Franklin (which amounted to $1.768 billion on October 2nd) would no longer be in the public interest. The Comptroller declared Franklin insolvent at 3:00 p.m. on October 8, 1974.

The Comptroller asserts that he had no part in any decisions concerning specific customers of the bank, and took all his actions in pursuance of his official duties as Comptroller of the Currency.

Plaintiffs in turn quote statements of the Comptroller to the House Committee on Banking on July 17, 1975 as indicating that there was no hope for Franklin after the events of May 1974, and assert that the facts show that the Comptroller knew the bank was insolvent at that time and was simply endeavoring to gain time so as to avoid public knowledge that Franklin would fail.

By July 2, 1974 the Comptroller had written to the FDIC asking that it make plans for an "assisted take over," which is possible only in the case of an insolvent bank. A statement of the Federal Reserve at the House hearings described the primary purpose of the loans to

Franklin as being a belief that the closing of Franklin "could have precipitated other bank failures with resulting large losses for many individuals and businessmen and for the Federal Deposit Insurance Corporation." The situation was particularly sensitive because of the difficult period then existing for financial institutions and financial markets. FRB considered that failure of Franklin at that time "could, in [its] judgment, have had serious adverse consequences for the stability of our nation's banking system. . . ." The Chairman of the FDIC testified at the House hearings that "[w]e were doing our best to maintain some cloak of secrecy over our actual negotiations and discussions in order not to have even more traumatic impact upon public confidence in banks. . . ."

The Receivership Transactions

Shortly before Franklin was declared insolvent, FDIC had solicited bids for some of Franklin's assets from several banks, on the basis of a proposed purchase and assumption agreement. EAB was the highest bidder, offering a premium of $125 million. On the same day that FDIC was appointed Receiver, it executed a Purchase and Assumption Agreement with EAB under which EAB agreed to assume Franklin's deposit liabilities and certain other specified liabilities

(then in the neighborhood of $1.5 billion), and to purchase assets of Franklin of an equivalent value (less the premium), to be selected by EAB. FDIC in its corporate capacity agreed to hold EAB harmless from any other claims of Franklin creditors and to conduct the defense of any such claim at its own expense.

With respect to the FRB debt, FDIC in its corporate capacity assumed the debt, and FRB released its lien on those Franklin assets which EAB might select. On the same day, FDIC as Receiver sold to FDIC as a corporation the remaining assets of Franklin, not selected by EAB; FDIC agreed to liquidate them and use the proceeds to pay the principal and interest due FRB, the cost of liquidation, and certain other related items, and to remit any excess to the Receiver as "contingent consideration" for the remaining assets.

It is a reasonable inference from the facts that the mortgages pledged with Franklin by plaintiffs on June 14, 1974 are not among the assets finally selected by EAB. Mortgage commitments were not among the liabilities which EAB assumed under Section 2 of the Purchase and Assumption Agreement.

The sales of assets by FDIC as Receiver to EAB and to itself as a corporation were approved by this court ex

parte under 12 U.S.C. § 192 and 12 U.S.C. § 1823, with the statement that

> The rights of creditors remain against the receiver and the assuming bank, and do not create any obstacle to the approval of the agreement.

In re Franklin National Bank, 381 F. Supp. 1390, 1393 (E.D.N.Y. 1974).

Post Receivership Negotiations With Plaintiffs

The supporting affidavits on the EAB motion set forth that there is no written agreement concerning any loan commitment to plaintiffs in its files or in the Franklin files which it took over. Plaintiffs who were old customers of Franklin, do not assert that there was any written commitment by Franklin to make a loan.

There was one advance by EAB after October 8, 1974. A check of $100,000 was issued to Ikenson Iron Works, Inc. on October 18, 1974 on behalf of Huntington, in reliance on a note for $100,000 signed by plaintiffs. The note is presently in default. Mr. Rilke, the Vice-President of EAB in charge of the transaction, asserts that he gave no assurances that financing would continue. He also asserts that completion of plaintiffs' building project was not scheduled before November 1975, more than a year after issuance of the Ikenson check.

Mr. Ikenson whose company was a subcontractor for the steel framework on plaintiffs' building, states in his affidavit that a Mr. Klaus Jacobs of EAB told him when the $100,000 check was issued that "[w]e intend to finance construction of the job because we have a commitment to Long Island," and that Mr. Rilke agreed to honor another $80,000 check the following week, but did not do so. Mr. Carey's affidavit confirms these statements, and asserts that he could have completed construction of the building within one year from October 18, 1974. He also asserts that FDIC's chief liquidator told him in November 1974 that it was in FDIC's interest to get the building built so that they would not lose money.

A "funding request" from Vice-President Rilke of EAB to the Senior Vice-President of the Real Estate Banking Department on October 17, 1974 described Mr. Carey's requirements of $500,000 of additional money and stated, "[m]eanwhile it is important to provide funds to enable the continuance of the construction project which should enhance the overall situation." This memorandum, which preceded the $100,000 advance by one day, was not delivered to plaintiffs, but was obtained by their counsel through a request for documents under the Freedom of Information Act.

Relevant Statutes

12 U.S.C. § 91. Transfers by bank and other acts in contemplation of insolvency

All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

12 U.S.C. § 191. General grounds for appointment of receiver

Whenever any national banking association shall be dissolved, . . . or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association . . . .

12 U.S.C. § 192. Default in payment of circulating notes

. . . Such receiver, under the direction of

> the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct . . . .
>
> 12 U.S.C. § 194. Dividends on adjusted claims; distribution of assets
>
> From time to time, . . . the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, . . .

Discussion of Law

I. Motion of Franklin National Bank (in liquidation)

One aspect of the claim against Franklin is that it agreed to lend plaintiffs money and did not lend it. This is a breach of contract, or an anticipatory breach, which is presumably actionable, although the extent of damages has not been briefed and the value of a general claim against the receivership estate may be doubtful.

The fact that no advance was due on the plaintiffs' loan at the precise moment of receivership does not mean that they have no provable claim against the Receiver. The cases cited by FDIC do not defeat the existence of a claim.

Argonaut Savings & Loan Association v. Federal Deposit Insurance Corporation, 392 F.2d 195 (9th Cir. 1968) was a case where the FDIC gave written notice of disaffirmance of plaintiff's lease several months before plaintiff exercised its option to terminate the lease. International Westminster Bank, Ltd. v. Federal Deposit Insurance Corp., 509 F.2d 641 (9th Cir. 1975) involved claims on letters of credit, of which all but two had been paid and the remainder might be paid. Here plaintiffs' claim, if valid, was directly against Franklin; and there was no one else to satisfy the claim.

A second aspect of the claim is that plaintiffs would not have given Franklin additional security on June 14, 1974 if they had known that Franklin was then insolvent and would not be able to complete the financing.

The Receiver disputes the validity of this claim under Dwelle-Kaiser Co. v. Aetna Casualty & Surety Co., 241 N.Y. 464 (1926), which it interprets as meaning that the insolvency of one party to a contract does not relieve the other of its obligation to perform, and thus that there is no obligation to disclose insolvency. In Dwelle-Kaiser a surety company took over performance of a contract after the

general contractor went bankrupt; it procured completion of a subcontract on the basis of orders from the general contractor, and did not pay the subcontractor. The court found that there was no duty to inform the subcontractor of the insolvency, that the subcontractor still had to perform its contract and that the only effect of the insolvency would be to permit it to demand cash payment for materials furnished. See also Hanna v. Florence Iron Co., 222 N.Y. 290 (1918).

The complaint in this case is not precise as to the nature of plaintiffs' agreement with Franklin. If the subcontractor in Dwelle-Kaiser "could have demanded cash payment" upon learning of the insolvency (241 N.Y. at 468), the plaintiffs here could perhaps have delivered their additional security in installments, concomitant with future advances by Franklin. Cf. Pardee v. Kanady, 100 N.Y. 121, 126-27 (1885). The complaint should not be narrowly construed on a motion to dismiss for failure to state a claim upon which relief may be granted. The court cannot now determine what actual facts may be proved or what the measure of damages may be. It may well be that in June of 1974 the Franklin officers still believed that their bank was solvent. In any event, the case should be permitted to proceed.

On this phase it does not matter whether the claim

against Franklin charges deceit. The Receiver is in a different position from FDIC as a corporation with respect to the Federal Tort Claims Act. Under the provisions of 28 U.S.C. § 2679(a) in conjunction with 28 U.S.C. § 2680(h), FDIC as a federal agency cannot be sued for misrepresentation or deceit. Insofar, however, as plaintiffs' claim rests on misrepresentation by Franklin before the receivership, proof of the claim against the Receiver is not forbidden by Section 2679. A claim for a tort committed by Franklin before receivership is provable as a claim against the receivership estate. Corbin v. Federal Deposit Insurance Corporation, (E.D.N.Y. 75-C-2144, Oral Memorandum of June 18, 1976). There is no basis for holding that a claim which would have been valid against a bank or a private receiver is invalid against FDIC as Receiver.

Insofar as the claim against the Receiver is based on statements made by Franklin officers or FDIC officials after the receivership, the situation is different.

Plaintiffs' claim against the Receiver cannot be supported by conversations after Franklin was placed in receivership. At such a time officers of the bank can no longer subject it to any obligation. Bryce v. National City Bank, 17 F. Supp. 792, 797 (S.D.N.Y. 1936), aff'd, 93 F.2d 300

(2d Cir. 1937). The further statements said to have been made by FDIC employees could not bind the Receiver, first because there was no consideration for a promise by the Receiver, and second because they did not rise to the level of formality necessary for the adoption of a contract by a Receiver.

Plaintiffs' prayer for relief need not be accepted as a proper measure of its claim. No basis has been shown for voiding mortgages and notes given to Franklin by plaintiffs, as they demand. Even if plaintiffs establish a claim against Franklin, they still owe Franklin repayment of amounts which were advanced, and Franklin is entitled to the security which was given for such advances.

Plaintiffs may still have two possible claims against the Receiver. The first is for damages for (anticipatory) breach of the agreement to make advances. The second is for rescission of all or part of the transfer of collateral made on June 14, 1974. The court expresses no opinion on the ultimate validity of any such cause of action.

II. Motion of FDIC as a Corporation

Plaintiffs' first claim against FDIC for damages for failure to disclose insolvency, is a claim in tort for misrepresentation or deceit, and therefore is not a permissible subject of suit against a federal agency.

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There is ample authority that FDIC is "a federal agency" as defined in the Federal Tort Claims Act, 28 U.S.C. § 2671, and therefore that sovereign immunity protects it from liability for torts of the type described in 28 U.S.C. § 2680, including "misrepresentation, deceit, or interference with contract rights." Section 2680(h). Safeway Portland Employees' Federal Credit Union v. Federal Deposit Insurance Corp., 506 F.2d 1213, 1215 (9th Cir. 1974); AMR Inc. v. Federal Reserve Bank, Civ. No. 44,387 (N.D. Cal. Order of April 28, 1966); Freeling v. Federal Deposit Insurance Corp., 221 F. Supp. 955, 957 (W.D. Okla. 1962), aff'd, 326 F.2d 971 (10th Cir. 1963); cf. Edelman v. Federal Housing Administration, 251 F. Supp. 715, 719 (E.D.N.Y. 1966), aff'd, 382 F.2d 594, 596-97 (2d Cir. 1967).

For the same reason FDIC cannot be sued for participation in an alleged fraud on creditors. It has no duty to warn the public concerning the impending insolvency of an insured bank. Davis v. Federal Deposit Insurance Corp., 369 F. Supp. 277, 280 (D Col. 1974).

This does not mean that the second claim must be dismissed against FDIC as a corporation, if it received assets of Franklin which were subject to a right of rescission by plaintiffs and which can be traced and identified. An

action for equitable or declarator relief and not for money damages may be maintained. B. C. Morton International Corp. v. Federal Deposit Insurance Corp., 305 F.2d 692 (1st Cir. 1967).

A claim for restitution may also be provable against FDIC. In re Anjopa Paper & Board Mfg Co., 269 F. Supp. 241 (S.D.N.Y. 1967).

A question may arise as to whether a claim for restitution can be established if the mortgages which plaintiffs pledged with Franklin were in turn pledged with FRB and came into FDIC's possession subject to the FRB lien. That issue need not be decided now.

This court's decision in Schy v. Franklin National Bank, 72-C-718 (E.D.N.Y. March 3, 1975), does not prevent pursuing restitution of specific assets in this action. That was a pre-receivership action against Franklin for making loans alleged to have been in violation of Regulation U of the Federal Reserve System. Parallel cases in other districts against other banks had been consolidated by the Judicial Panel on Multidistrict Litigation for transfer to the Southern District of New York. In re The Susquehanna Corporation Securities Litigation, MDL # 197. The attack on transfers to FDIC was not focussed on specific assets in the

Schy case. This court refused to complicate that multi-district litigation by granting a request for joinder of an alleged transferee under F.R.Civ.P. 25(c), saying (p. 9):

> Judicial economy would favor making a determination of FDIC's corporate liability in an action where rights of other solvent banks are not at issue, and after Franklin's liability has been established.

The Schy case, in its application here, means that parties whose claim is unliquidated, and whose status as creditors is disputed, should not be permitted to challenge the general validity of FDIC's lien, or its selection of liabilities which should be assumed by EAB, in the same case where they seek to establish their status as creditors. Even if plaintiffs establish a right to damages, it may be fully offset by the amount of advances made by Franklin. The corporate liability of FDIC is not prematurely raised, however, insofar as the complaint relates to restitution of specific assets which may be in the possession of FDIC.

Since plaintiffs' claim is not for tort, the requirement of first presenting the claim to FDIC under 28 U.S.C. § 2675(a) is not applicable, even if a corporation like FDIC with a "sue and be sued" clause is subject to the provisions of that section.

The claim against FDIC as a corporation therefore may stand as a claim for restitution of collateral given to Franklin by plaintiffs, but should be dismissed in other respects. The court expresses no opinion on the merits of plaintiffs' claims.

III. Motion of Federal Reserve Bank of New York

Although the motion of FRB is based on Rules 12(b)(1) and (6) for failure to state a claim and for lack of jurisdiction over the subject matter, its memorandum cites other documents which are annexed to it. In the light of the documentation on other motions concerning the facts leading up to the receivership of Franklin, it is proper to treat the motion as one for summary judgment under F.R.Civ.P. 56.

In a motion under Rules 12(b)(1) and (6), it might be necessary to accept the statement in the complaint that FRB knew on and after May 15, 1974 that Franklin was insolvent. However, on a motion for summary judgment the court may consider that the acting Comptroller of the Currency by letter of May 10, 1974 had notified the Board of Governors of the Federal Reserve System that

> [a]t the last full examination of the subject bank which terminated on March 8, 1974, the bank was found to have fairly severe credit and liquidity problems, but was adjudged to

> be solvent. Although the liquidity problem has subsequently become aggravated by adverse rumors circulating in the market place, to date, we have not received any information which would materially alter our March 8, 1974 conclusion that the bank is solvent. If there is any significant change in the condition of the bank, this Office will promptly advise you.

On May 12, 1974, FRB issued a press release stating in part,

> Working with Franklin National, the Federal Reserve Bank of New York has determined that there is a large amount of acceptable collateral available to support advances to the bank from the Federal Reserve discount window, if they are needed.
>
> As a matter of general policy, the Federal Reserve makes credit extensions to member banks, upon acceptable collateral, so long as the borrowing member bank is solvent. We are assured by the Comptroller of the Currency that Franklin National Bank is a solvent institution.

Within ten days after May 12, 1974, FRB had advanced more than $1 billion to Franklin on demand notes. Plaintiffs argue that FRB should have known in May 1974 that Franklin was in fact insolvent. This represents an indirect attack on the Comptroller's certification that Franklin was solvent when the FRB advances began. In the view the court takes of the law, plaintiffs' contention does not raise a material issue that can defeat summary judgment for FRB.

Since the first claim against FRB is based on tort liability for failure to disclose the alleged known insolvency of Franklin, it is barred by the Federal Tort Claims Act, 28 U.S.C. § 2680(h), for the same reasons described with respect to FDIC as a corporation.

The attempt to impose liability on FRB for granting a secured loan to Franklin is barred also by the provisions of 28 U.S.C. § 2680(a), which sets forth that the Federal Tort Claims Act

> . . . shall not apply to -
>
> (a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

In other circumstances courts have refused to review discretionary acts of the Federal Reserve banks. Raichle v. Federal Reserve Bank, 34 F.2d 910 (2d Cir. 1929); Billings Utility Co. v. Advisory Committee, 135 F.2d 108 (8th Cir. 1943).

Insofar as the second claim in the complaint seeks to attack the lien which FRB received on Franklin assets, it is not appropriate to press the claim against FRB. Under the "Agreement of Assumption of Indebtedness" dated October 8,

1974 between FRB and FDIC as Receiver and as a corporation, FRB released its lien to EAB with respect to the assets purchased by or transferred to it, and to FDIC as a corporation with respect to the remaining assets. FDIC in turn assumed and agreed to pay the entire FRB indebtedness together with interest. If there were any defect in FRB's lien, it might affect the assets in the hands of FDIC, but FRB is not a necessary party to the litigation.

Even if 12 U.S.C. § 91 applies to loans from FRB to a member bank, it would be necessary to determine first whether the liens were given "in contemplation" of insolvency, and second whether they were given "with a view to prevent the application of [Franklin's] assets in the manner prescribed by" the National Bank Act "or with a view to the preference of one creditor to another . . . ." Section 91 is R.S. § 5242 unchanged, and was derived from the National Bank Act of June 3, 1864, 13 Stat. 115 and the Act of March 3, 1873, ch. 269 § 2, 17 Stat. 603.

Subsequently the Federal Reserve Act of 1913 gave Federal Reserve banks specific and varied authority to make loans to member banks. 12 U.S.C. § 347 permits advances to member banks for periods not exceeding 15 days on promissory notes secured by pledge of United States Treasury indebtedness and 12 U.S.C. § 347(b) provides:

P-C49

> Any Federal Reserve bank, under rules and regulations prescribed by the Board of Governors of the Federal Reserve System, may make advances to any member bank on its time or demand notes having maturities of not more than four months and which are secured to the satisfaction of such Federal Reserve bank. . . .

Franklin's notes to FRB were for the most part for only one day. There is no evidence that any were for four months. Continuance of short-term loans for over four months does not violate the statutory limitation against notes "having maturities of not more than four months."

It is not claimed by FRB that § 347(b) repealed § 91; but the two sections should be read in relation to each other, and to the general rule that a pledge of collateral for new money does not constitute a preference. Lucas v. Federal Reserve Bank, 59 F.2d 617, 621 (4th Cir. 1932). The Federal Reserve banks, as lenders of last resort to their member banks, are given authority to respond to problems which affect individual banks and the banking community as a whole. The General Principles Section of Regulation A, 12 C.F.R. 201.2 in effect in May 1974 provided in part

> (e) Emergency credit for member banks. Federal Reserve credit is available to assist member banks in unusual or emergency circumstances such as may result from national,

> regional, or local difficulties or from exceptional circumstances involving only a particular member bank.

The ability of Federal Reserve banks to serve their function may be inhibited if loans to a national bank suffering liquidity problems are subject to reexamination after the event, on the basis of court determinations of insolvency or the likelihood of insolvency at the time emergency action was taken. In 1 Report of a System Committee, Reappraisal of the Federal Reserve Discount Mechanism (1971), p. 19, the Board of Governors stated:

> The Federal Reserve System has a clear responsibility to lend to member banks in both isolated and widespread emergency situations. It is expected that such assistance would often have beneficial effects for the economy as a whole, but in such cases the immediate responsibility of the System is directly to the member bank. This is one of the benefits of Federal Reserve membership - paid for in a sense by the maintenance of non-earning assets in satisfaction of reserve requirements - and a basic source of confidence in the banking system.

The loans to Franklin by FRB served at least three purposes, not connected with any intent to prefer creditors: First to buy time within which to find a solution to Franklin's problems, second to cushion the impact on the economy which might be anticipated from the failure of a major bank, and

third to stave off a liquidity problem which would interfere with adequate study of the Franklin situation.

The situation in Texas & Pacific Railway Co. v. Pottorff, 291 U.S. 245, 253, 54 S.Ct. 416, 417 (1934) was quite different from the present one. It involved a bank's pledge of part of its assets to secure a private deposit, an act which Mr. Justice Brandeis said was beyond the power of a national bank. It is clear that under present statutes Franklin had power to pledge its assets with FRB and that FRB had power to make the loan here involved. Similar comments apply to Roberts v. Hill, 24 F. 571, (Cir. Ct. Vt. 1885), on which plaintiffs also place great reliance. That involved a transfer of a note to a single depositor, not a borrowing from a Federal Reserve bank; in fact, the Federal Reserve System was not in existence at the time.

For all the reasons set forth, FRB is not a necessary or proper defendant.

IV. Motion of European-American Bank

With respect to the damage claim against EAB, both parties agree that advances under a mortgage are subject to the statute of frauds. New York General Obligations Law §5-703(1); Donahue v. Manufacturers Trust Co., 10 Misc.2d 298, 166 N.Y.S.2d 174 (Sup.Ct. West. Co. 1957); Sleeth v.

Sampson. 237 N.Y. 69 (1923).

Plaintiffs concede that there is no agreement in writing binding EAB.

Plaintiffs rely for their first claim on the provision of Section 5-703(4) that

> Nothing contained in this section abridges the powers of courts of equity to compel the specific performance of agreements in cases of part performance.

The only part performance alleged by plaintiffs, however, is an advance of $100,000 by EAB against a promissory note. Even if the alleged statements of EAB officers about continuing the financing of the building were sufficiently firm and definite to constitute an agreement, the advance of $100,000 by EAB would not be an equitable reason for avoiding the statute of frauds.

Specific performance may be required by an equity court if refusal to enforce an oral contract would cause loss to somebody who has acted in reliance on the contract. See Cooley v. Lobdell, 153 N.Y. 596, 602 (1897). Plaintiffs suffered no detriment, however, from the fact that EAB lent them $100,000 that it was not obligated to lend.

Part performance must also be "unequivocally referable" to the alleged oral agreement. Gracie Square Realty Corp. v. Choice Realty Corp., 305 N.Y. 271, 279-80

(1953), quoting from Burns v. McCormick, 233 N.Y. 230, 232 (1922). The advance of $100,000 by EAB was merely an expensive way of keeping plaintiffs in operation until EAB could determine whether it was willing to assume a building loan agreement with plaintiffs.

As pointed out above, mortgage commitments were not included among the liabilities which EAB assumed under the Purchase and Assumption Agreement. On the contrary, the Purchase and Assumption Agreement made plain that any advance to a Franklin customer by EAB, if made within 180 days after the bank closing, did not prevent EAB from rejecting the loan (¶¶ 3.5 and 3.6, pp. 17-21).

Insofar as EAB relies on Section 5-701(1) of the General Obligations Law relating to contracts which by their terms cannot be performed within a year, the court agrees with plaintiffs that there is sufficient dispute about the facts so that this would not justify summary judgment dismissing the claim. North Shore Bottling Co., Inc. v. C. Schmidt & Sons, Inc., 22 N.Y.2d 171, 175-76, 292 N.Y.S.2d 86 (1968).

With respect to plaintiffs' second claim, EAB is entitled to the protection accorded a bona fide purchaser. Even if there were a violation of U.S.C. § 91 by Franklin and FRB, that would not defeat the title which EAB received

by purchase from FDIC. EAB had received definite assurances of the validity of FDIC's sale. As is stated in Comment 1 to Section 297 of the Trusts Restatement (2d),

> If the transferee has notice of the existence of a trust and of the terms of the trust, and after using due diligence to ascertain whether the transfer is in breach of trust reasonably believes that the facts are such that the transfer is not in breach of trust, he takes free of the trust if the other requirements of bona fide purchase are complied with.

Having submitted a competitive bid and offered a $125 million premium over the book value of the assets it was acquiring, EAB cannot be charged with any fraud which impairs its title to assets which it acquired.

Moreover, FDIC in its corporate capacity under the Indemnity Agreement of October 8, 1974 agreed to indemnify EAB against any claims "of any present or former creditor, customer, or supplier" of Franklin and to conduct the defense of any such claim at its own expense (¶¶ 1(ii), 3). Since FDIC is solvent, and can recoup any losses by assessments against member banks, there is no justification for keeping EAB as a defendant.

V. Motion of Comptroller of the Currency James E. Smith

The Comptroller was engaged for several months, at least from May to October, in developing a long-term solu-

tion to Franklin's problems. He declared Franklin insolvent at 3:00 p.m. on October 8, 1974, after FDIC had developed a plan for the sale of enough assets to cover the remaining deposit liabilities and assure the continuance of banking services, and after FRB had informed him on October 7, 1974 that it no longer viewed the continuation of its program of credit assistance to Franklin to be in the public interest.

The claim against the Comptroller is definitely barred by the Federal Tort Claims Act, both as one based on misrepresentation or deceit, under 28 U.S.C. § 2680(h), and as one based on "the exercise or performance or the failure to exercise or perform a discretionary function or duty" under 28 U.S.C. § 2680(a). There was a square holding to this effect under almost identical circumstances arising from the receivership of the United States National Bank of San Diego. San Luis Rey Downs, Inc. v. Smith (S.D. Calif. 75-0094, Order entered August 29, 1975). This branch of the action is not even against a federal corporation, but against a federal official and clearly seeks to recover money from the United States Treasury. Hawaii v. Gordon, 373 U.S. 57, 83 S.Ct. 1052 (1963).

Plaintiffs argue that there must be "a minimal objective standard of insolvency" at which the Comptroller

must appoint a receiver. There is no basis in the statute for such a ruling. The language of 12 U.S.C. § 191 is that the Comptroller "may" appoint a receiver when he is satisfied of the insolvency of a national bank. The timing of a receivership is a sensitive matter, on which the Comptroller's discretion should not be hampered by fears of judicial second-guessing. Liberty National Bank v. McIntosh, 16 F.2d 906, 909 (4th Cir.), cert. denied, 273 U.S. 783, 47 S.Ct. 571 (1927); O'Connor v. Bankers Trust Co., 159 Misc. 920, 930-31, 289 N.Y.S. 252, 267-68 (Sup.Ct. N.Y. Co. 1936), aff'd, 253 App.Div. 714, 1 N.Y.S.2d 641 (1st Dept. 1937), aff'd, 278 N.Y. 649 (1938); Harmsen v. C. Arnholt Smith (S.D. Cal. Civ. 73-460, Order of July 28, 1975).

The Comptroller is not subject to liability in this action, either in his official capacity or individually.

Conclusion

It is ORDERED:

1. That the motion for dismissal of the complaint as against Franklin National Bank (in liquidation) be denied as to the first claim, and granted as to the second claim, except insofar as the second claim seeks to trace the securities described in Paragraph 11 of the complaint;

2. That the motion to dismiss the complaint as

against Federal Deposit Insurance Corporation be granted except insofar as it seeks to trace the securities described in Paragraph 11 of the complaint;

3. That the motion of Federal Reserve Bank of New York to dismiss the complaint be granted;

4. That the motion of defendant European American Bank to dismiss the complaint be granted; and

4(a). That the motion to stay discovery against defendant European-American Bank & Trust Company be granted, without prejudice to any discovery which may hereafter be requested of European-American Bank & Trust Company as a witness; and

5. That the motion to dismiss the complaint as against defendant James E. Smith individually and as Comptroller of the Currency, be granted.

There being no just reason for delay with respect to Paragraphs 3, 4, and 5 above, the Clerk shall enter judgment dismissing the complaint as against defendants Federal Reserve Bank of New York, European-American Bank, and James E. Smith, with costs.

U. S. D. J.

JUDGMENT

JA 193

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

HUNTINGTON TOWERS, LTD. and
RICHARD CAREY,

Plaintiff,

- against -

FRANKLIN NATIONAL BANK (liquidation)
FEDERAL DEPOSIT INSURANCE CORPORATION,
FEDERAL RESERVE BANK OF NEW YORK,
EUROPEAN-AMERICAN BANK and JAMES
SMITH, individually and as Comptroller
of the Currency,

Defendants.

----------x

U.S. DISTRICT COURT E.D.N.Y.
JUL 6 1976
JUDGMENT
75 C 972

A memorandum and order of Honorable Orrin G. Judd, United States District Judge, having been filed on July 1, 1976, granting the motions of the Federal Reserve Bank of New York, the European-American Bank and James E. Smith, individually and as Comptroller of the Currency, to dismiss the complaint and there being no just reason for delay, directing the Clerk to enter judgment dismissing the complaint as against defendants Federal Reserve Bank of New York, European-American Bank and James E. Smith, with costs, it is

ORDERED and ADJUDGED that the complaint as against defendants Federal Reserve Bank of New York, European-American Bank and James E. Smith is dismissed with costs.

Dated: Brooklyn, New York
July 2, 1976

Lewis Orgel
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

HUNTINGTON TOWERS, LTD. and RICHARD CAREY,

Plaintiffs,

-against-

FRANKLIN NATIONAL BANK (in liquidation), FEDERAL DEPOSIT INSURANCE CORPORATION, FEDERAL RESERVE BANK OF NEW YORK, EUROPEAN-AMERICAN BANK and JAMES SMITH, individually and as Comptroller of the Currency,

Defendants.

- - - - - - - - - - - - - - - - - - - X

75-C-972

NOTICE OF APPEAL

S I R S :

PLEASE TAKE NOTICE that Huntington Towers, Ltd. and Richard Carey, plaintiffs in the above-entitled action, hereby appeal to the United States Court of Appeals for the Second Circuit from so much of an order entered in this action on July 6, 1976 as granted the motions of defendants Franklin National Bank (in liquidation), Federal Deposit Insurance Corporation, Federal Reserve Bank of New York, European-American Bank and James E. Smith, individually and as Comptroller of the Currency, to dismiss the complaint herein.

Dated: New York, New York
July 9, 1976

Yours, etc.,

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Richard Carey

By: _____
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Service of One Copy copies of the
within Appendix is hereby
admitted this 29th day of
Oct. 1976
Signed Thomas M. Doyle/CGR
Attorney for Defendant-Appellee
Federal Reserve Bank of N.Y.

Service of One Copy copies of the
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admitted this 29th day of
Oct. 1976
Signed Stewart Caldwell
Attorney for Defendant-Appellee
European American Bank

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Oct. 1976
Signed
DEFENDANTS
Attorney for Federal Deposit Ins. Corp.
and Franklin National Bank
(In Liquidation)

Service of One Copy copies of the
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admitted this 29th day of
Oct. 1976
Signed Paula T. Pearson
Attorney for Defendant-Appellee
James Smith

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